146 U.S.

RECORD, CASE No. 13,632.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 85.

MILFORD H. BRINKERHOFF AND WILLIE C. BRINKERHOFF, EXECUTORS OF ALEXANDER W. BRINKERHOFF, DECEASED, APPELLANTS,

vs.

ALBERT S. ALOE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED SEPTEMBER 13, 1889.

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INDEX.

	Original.	Print.
Bill of complaint	1	1
Exhibit A—Letters patent No. 224,991, granted Alex'r W. Brinkerhoff March 2, 1880	4½	3
Answer	5	4
Replication	10	7
Bill of revivor	11	8
Exhibit D—Letters of administration on estate of Alex. W. Brinkerhoff	13	9
Evidence for complainant	15	10
Notice to take testimony	15	10
Testimony of Alex'r W. Brinkerhoff	16	11
Adolph Billhardt	29	19

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 12, 1892.

	Original.	Print.
Testimony of Milford H. Brinkerhoff	30	20
Wm. C. Brinkerhoff	31	20
Notary's certificate	33	21
Exhibit A—File-wrapper and contents in the matter of letters patent No. 224,991, granted Alex'r W. Brinkerhoff March 2, 1880	34	22
Petition	34	22
Oath	34	22
Letter of A. W. Brinkerhoff, August 1, 1878	36	23
A. G. Wilkinson, examiner, July 2, 1879	36	23
A. W. Brinkerhoff, July 5, 1879	37	24
A. W. Brinkerhoff, July 13, 1879	37	24
A. G. Wilkinson, July 29, 1879	38	24
A. W. Brinkerhoff, August 2, 1879	39	25
A. G. Wilkinson, examiner, Aug. 8, 1879	40	25
Power of attorney	41	26
Application allowed	41	26
Letter of A. W. Brinkerhoff, January 6, 1880	42	27
Letter of H. E. Paine, Commissioner, Jan. 9, 1880	43	27
Revocation of power of attorney	44	28
Letter of A. W. Brinkerhoff, January 17, 1880	45	28
B—Letter of Ellis Spear, Commissioner of Patents, to Alex. W. Brinkerhoff, October 10, 1878	47	30
D—Bill of Codman & Shurtleff against Dr. A. Billhardt, January 12, 1878	48	31
Further evidence for complainant	49	31
Notice to take testimony	49	31
Testimony of Jacob Fuchs	50	32
A. W. Brinkerhoff	56	35
Notary's certificate	57	36
Cost bill, &c.	58	36
Clerk's certificate to notary	58	37
Evidence for complainant in rebuttal	59	37
Notice to take testimony	59	37
Notary's certificate	60	37
Testimony of Dr. Abiram Francis Squire	60	38
Exhibit 20—Diagram	65	40
Evidence for defendant	69	41
Testimony of John P. Bryson	70	42
Augustus C. Bernays	83	47
Henry H. Mudd	113	61
Herman Spackler	128	69
Warren B. Outten	139	74
Herman Spackler (recalled)	149	79
Andrew Leslie	161	85
Charles E. Michel	175	91
William Grady	190	99
Albert S. Aloe	206	106
Herman Spackler (recalled)	220	113
Samuel Knight	225	115
Charles E. Michel (recalled)	241	123
Julius Robertson	243	124
Henry H. Mudd	245	124

	Original.	Print.
Examiner's certificate	252	127
Final decree	254	128
Order allowing appeal	254	128
Order approving bond, &c.	255	128
Appeal bond	256	129
Opinion of Judge Thayer	257	130
Clerk's certificate	265	134

1 Circuit Court of the United States for the Eastern District of Missouri.

Complainant's Record.

Bill of complaint. Filed January 20, 1886.

To the Honorable David J. Brewer and Samuel Treat, judges of said court:

Your orator, Alexander W. Brinkerhoff, now comes and respectfully shows and represents unto your honors that he is a resident of Upper Sandusky, in Wyandot county, Ohio, and that he is a citizen of said State of Ohio.

That heretofore, to wit, on or about the twenty-eighth day of June, A. D. 1879, your orator having theretofore and within two years next prior thereto invented certain new and useful improve-
2 ments in rectal specula, applied to the Patent Office of the United States for letters patent for such improvements, and afterwards, to wit, on the second day of March, A. D. 1880, letters patent of the United States for an improvement in rectal speculums were issued to your orator, which said letters patent, No. 224,991, were duly signed by the acting Secretary of the Interior and by the acting Commissioner of Patents. A full copy of the specifications and drawings thereof is herewith filed, marked "A."

That in and by said invention and in and by said letters patent your orator became entitled to the exclusive right to use and to vend to others to be used said improvement in rectal speculums for the full term of seventeen years from said second day of March, A. D. 1880.

That, notwithstanding the rights aforesaid of your orator by reason of said invention and under said letters patent, one Albert S. Aloe, whose residence is in the city of St. Louis, in the eastern district of Missouri, as your orator is informed and believes, and whom your orator prays may be made a party defendant hereto, contriving and intending to injure, wrong, and defraud your orator in the premises, and to deprive him of the full and exclusive use and enjoyment of the said improvement in rectal speculums, has manufactured and caused to be manufactured, has used and caused to be used, and has sold to others to be used said invention and improvement, at the said city of St. Louis and elsewhere, and without the license or consent of your orator.

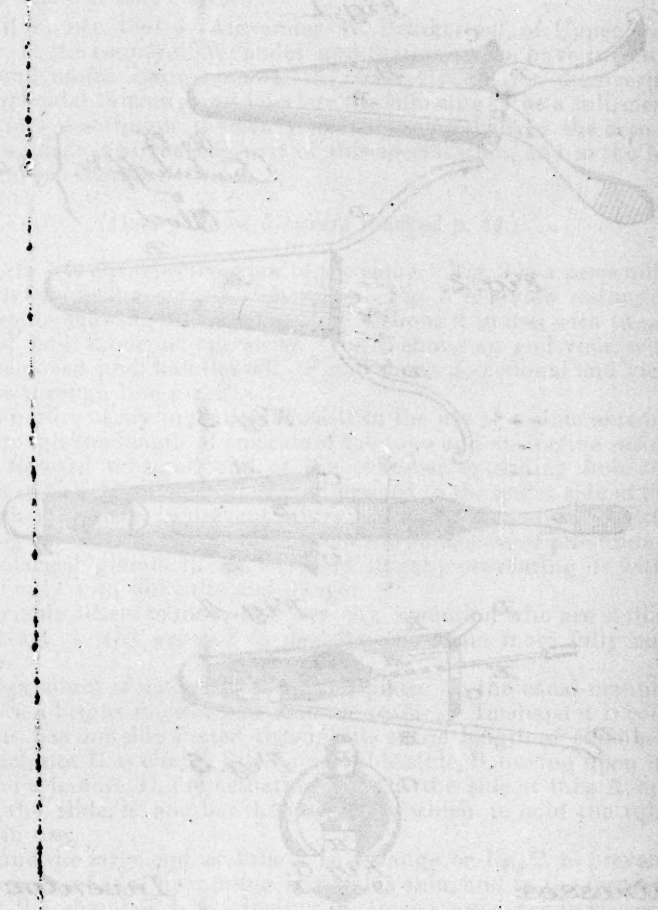
That said Albert S. Aloe, who is engaged in trade and business under the firm name and style of A. S. Aloe & Co., at No. 300 North Fourth street and at Nos. 325 and 327 Olive street, in the city of St. Louis, as a manufacturer, importer, and wholesale and retail dealer in mathematical, surgical, optical, and electrical
3 instruments, has for more than one year last past, at his said places of business, without any license or right therefor, been manufacturing and causing to be manufactured in great quantities rectal speculums containing and embodying the inventions

and improvements covered and secured to your orator by said letters patent; and said Albert S. Aloe, under his said business designation of A. S. Aloe & Co. and otherwise, at said city of St. Louis and elsewhere, has since said second day of March, A. D. 1880, and especially since the first day of January, A. D. 1885, been using and vending and furnishing said speculums to others to be used in very large quantities, and from which use and sale said Albert S. Aloe has received and is receiving and realizing great gains and profits, all to the great wrong and injury of your orator.

That, although your orator has notified said Albert S. Aloe at divers times since said second day of March, A. D. 1880, of his said infringement upon the rights of your orator under said letters patent and demanded of him that he cease to so infringe and that he come to an account with your orator for the loss and damage inflicted upon your orator, as hereinbefore alleged, by his said infringements, *but* said Albert S. Aloe has refused and still refuses to come to such account or in any manner account to your orator for such gains and profits as have come to him from the manufacture, use, and sale of speculums embodying said inventions and improvements, and also continues to manufacture, use, and sell said speculums for his own use, benefit, and gain, and without any license or legal right so to do it, and also is giving out and declaring that he has full right to make, use, and send to others to be used said speculums embodying said inventions and improvements covered by said letters patent, and that he will continue so to do.

4 Whereupon your orator prays that said Albert S. Aloe may be made a party defendant hereto; that your writ of subpœna may issue against him out of chancery, to the marshal of said eastern district of Missouri; that he make full answer hereto; that your orator may have the temporary or provisional injunction of the court pending this bill, and, on the final hearing hereof, the perpetual injunction, restraining said Albert S. Aloe and all others, his servants, clerks, and employees, from directly or indirectly making, using, or sending to others to be used said invention and improvement or any speculum embodying the same; also that your orator may have against said Albert S. Aloe a full account of all profits and gains that have come to said Aloe, or that may, pending this bill, come to him from the manufacture, use, or sale of said speculums or said inventions and improvements, and for other and full relief.

ALEXANDER W. BRINKERHOFF,
By LEE, BROWN & LEE, *His Solicitors.*

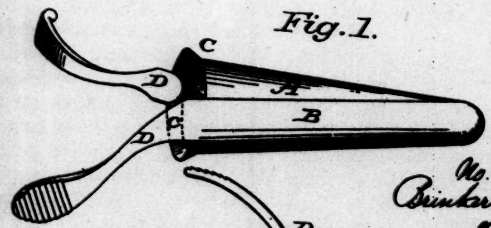


A. W. BRINKERHOFF.

Rectal-Speculum.

No. 224,991. Patented Mar. 2, 1880.

Fig. 1.



No. 65. Brinkerhoff, Dr. } $4 3/4
Aloe.

Fig. 2.

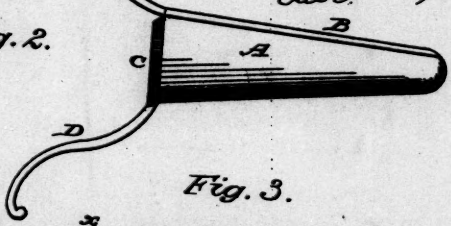


Fig. 3.

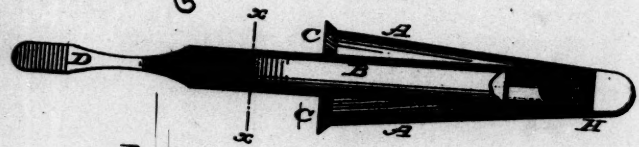


Fig. 4.

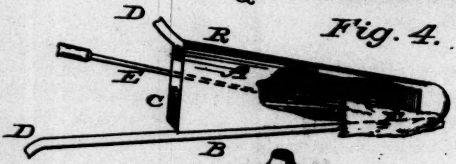
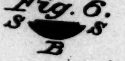


Fig. 5.

Fig. 6.



Witnesses:
J. E. Davids
M Burrill

Inventor:
Alexander W. Brinkerhoff

4½

UNITED STATES PATENT OFFICE.

ALEXANDER W. BRINKERHOFF, of Upper Sandusky, Ohio.

Rectal Speculum.

Specification forming part of Letters Patent No. 224,991, dated March 2, 1880. Application filed June 28, 1879.

To all whom it may concern:

Be it known that I, Alexander W. Brinkerhoff, of Upper Sandusky, in the county of Wyandot and State of Ohio, have invented new and useful improvements in rectal specula for discovering hemorrhoidal tumors; and I declare the following to be a full, clear, and exact description thereof, reference being had to the accompanying drawings, making part of this specification, and to the letters marked thereon.

(Here follows diagram marked p. 4¾.)

Figure 1 is a perspective view of the same. Fig. 2 is a perpendicular view, showing spread of handles. Fig. 3 is a view resting on one handle, showing slide drawn. Fig. 4 shows it in use, with tumor entered and mode of operating. Fig. 5 shows an end view, with slide removed and handles off. Fig. 6 shows a sectional end view of slide through line *x x*, Fig. 3.

The nature of my invention consists in the use of a slide extending through the length of one side of the tube and an incline inside of the forward or small end of the chamber, extending from the bottom of the chamber upward and forward to the under side of the slide when in place, to prevent injury to the membrane while withdrawing the instrument and to prevent the impaction of pile-tumors and enlarged glands in its end, and thereby preventing its withdrawal only with difficulty and danger.

To enable others to make and use my invention who are skilled in the art, I will proceed to describe the same more fully and clearly.

My speculum is made of metal and plated in the usual manner to secure a bright interior and smooth surface. In shape it is conical, and has one side slotted through its entire length of chamber. Into such slot H is closely fitted a movable slide, B, having upon its rear end a handle, D, for actuating it. On the side of tube A, opposite the slide, is another handle, D, by which to hold the tube when in use.

Around the large end of tube A is a flange or lip, C, to prevent the entrance of anal membrane or surplus skin, and in the forward end of the chamber is an incline, K, made necessary in specula having closed ends to prevent the entrance of fæces into the speculum, to prevent the impaction of pile-tumors, enlarged glands, or surplus membrane in the end of the chamber, and thereby enable the operator to withdraw the instrument with safety and ease.

I am aware that slotted specula are common, and I do not claim such as any part of my invention.

My invention differs from others in this, that while their sides are open from end to end when the examination is made in the rectum, and the abnormal parts enter through the entire length at once, the lower end often becoming entirely closed first and cutting off all view of the upper part, mine only admits such parts through the opening as made by slowly drawing the slide downward, even to the anal orifice, if desired, the adjustable side enabling me to keep out all desired below its inner end, and admit what is to be examined without any obstruction to the view.

Some of the advantages of my invention are made clear and plain by clasping the speculum in one hand and drawing the slide with the other. At the same time, with the large end toward a strong light, look in and examine the hand through the slot.

Having thus fully described my invention, its nature, mode of construction, and manner of using the same, what I claim as new and desire to secure by letters patent of the United States is—

1. A slide in the side of a speculum, extending through its whole length, and used substantially as herein described.

2. The incline in the front end of the chamber, in combination with the tube, slot, and slide, substantially as and for the purposes herein set forth.

3. In cylindrical tubular specula having a slotted slide and closed end to prevent the entrance of fæces, the incline in the front end of the chamber, extending upward from the bottom and forward to under side of slide, substantially as described, and for the purposes herein set forth.

ALEXANDER W. BRINKERHOFF.

Witnesses:
J. E. DAVIDS.
M. BURRELL.

5 In the Circuit Court of the United States for the Eastern District of Missouri.

ALEXANDER W. BRINKERHOFF, Complainant,
vs.
ALBERT S. ALOE, Defendant.
} No. 2594. In Equity.

Answer. Filed May 3, 1886.

To the honorable judges of the circuit court of the United States for the eastern district of Missouri:

The defendant, now and at all times hereafter, saving and reserving to himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said orator's bill of complaint contained, for answer thereto, or so much thereof as the defendant is advised is material or necessary for him to make answer unto, this defendant, answering, says:

This respondent is not informed, save by said bill of complaint, whether said alleged letters patent in said bill mentioned were ever issued to said Alexander W. Brinkerhoff, and, if issued, whether it was issued in due form of law, and he leaves complainant to make such proof thereof as he may be advised is material.

This defendant denies on information and belief that the complainant, Alexander W. Brinkerhoff, was the true, original, and first inventor of the apparatus covered by the letters patent mentioned in said bill, and denies that he has manufactured and
6 caused to be manufactured, has used and caused to be used, and has sold to others to be used, said alleged invention and improvement in rectal speculums, as set forth in said letters patent, with the intent to injure, wrong, and defraud the complainant, and to deprive him of the full use and enjoyment of the said alleged improvement in rectal speculums; and denies that he has been using and vending and furnishing said speculums to others to be used in large or small quantities and reaping and receiving great or any gains and profits to the wrong and injury of the complainant; and this defendant, further answering, says that the apparatus covered by the letters patent mentioned in the bill of complaint was not an invention when produced by said Alexander W. Brinkerhoff, and that it was a mere aggregation of elements, each producing its individual function, not co-operating together to produce any new and useful result, and that each element would produce the same result when used alone as it does when combined with the other elements, as claimed in said letters patent, and that the rectal speculum is an old and well-known instrument and has been used many years prior to the alleged invention, and that the slot, slide, and mirror, either separately or combined, as applied in rectal speculums, are old in the state of art, and that no invention exists in the thing described, shown, and claimed under said letters patent No. 224,991, dated March 2, 1880, and that the same is void and of no effect, and that said apparatus, as claimed in said letters patent, was not novel at that time, and that an apparatus substantially identical with it in character was previously patented in letters patent of Great Britain to John Clayton Newburn, No. 153 of 1879, for improvements for illuminating, etc., certain parts of the human body; and in letters patent of Great Britain, granted to Richard A. Broonan, No. 1921 of 1865, for improvements in reflectors for examination of the throat, and that another like apparatus was previously described on pages 62 and 68 of a catalogue published in the year 1872
7 by G. Tieman & Co., of 67 Chatham street, New York; and still another like apparatus was previously described on page 171 of a printed book entitled Hilton "On Rest and Pain" (second edition), published in the year 1879 by William Wood & Co., of New York, State of New York; and that still another like apparatus was previously described on page 840 of a printed book published by Shepherd & Dudley, in the city and State of New York, in the year 1878; and that still another like apparatus was known and used at Wauseon, State of Ohio, and elsewhere, by F. H. Rorick, of Wauseon, Ohio, as early as 1879; and that still another like ap-

paratus was known and used at Grand Rapids, Michigan, and elsewhere, by A. B. Botsford, of Grand Rapids, Michigan, as early as 1879; and that still another like apparatus was known and used at Philadelphia, Pennsylvania, and elsewhere, by Charles Lentz, of Philadelphia, Pa., as early as 1877; and that still another like apparatus was known and used at Boston, Massachusetts, and elsewhere, by Benjamin S. Codman, of Boston, Massachusetts, as early as 1879; and that still another like apparatus was known and used at Boston, Massachusetts, by F. O. Whitney, Asahel M. Shortleff, and Benjamin S. Codman, all of Boston, Massachusetts, as early as 1879; and that still another like apparatus was known and used at Philadelphia, Pennsylvania, and elsewhere, by J. H. Gemrig, of Philadelphia, Pa., as early as 1877; and that still another like apparatus was known and used at St Louis, Mo., and elsewhere, by Andy M. Leslie, of St. Louis, Mo., as early as 1878; and that still another like apparatus was known and used at St. Louis, Mo., and elsewhere, by Herman Spackler, of St. Louis, Mo., as early as 1875; and that still another like apparatus was known and used at Philadelphia, Pennsylvania, and elsewhere, by William Grady, of St. Louis, Mo., as early as 1877; and that still another and like apparatus was
8 known and used at New Orleans, Louisiana, and elsewhere, by —— Thompson, of New Orleans, Louisiana, as early as 1879; and that still another like apparatus was known and used at New Orleans, La., and elsewhere, by I. L. Lyons, of New Orleans, La., as early as 1879; and that still another and like apparatus was known and used at Philadelphia, Pennsylvania, and elsewhere, by —— Reed, of Philadelphia, Pa., as early as 1877; and that still another and like apparatus was known and used by Wm. Eyers, of the city of New York, State of New York, as early as 1878; and that still another and like apparatus, called the endoscope, with incline reflector, was made by Herman Spackler, of St. Louis, Missouri, for Drs. Hodgen & Mudd, and used by them in said city of St. Louis as early as 1877, and by all of said parties prior to the time when it is alleged in the said bill of complaint the same was invented and discovered by the said Alexander W. Brinkerhoff.

And, further answering, this defendant says on information and belief that long anterior to the time it is alleged in said bill of complaint that said Alexander W. Brinkerhoff conceived said alleged invention and improvement the said alleged invention was invented and discovered by others, whose names and residences are unknown to the defendant herein, but which will be added hereto as soon as discovered and leave of court obtained.

And this defendant, further answering, says on information and belief that the said Alexander W. Brinkerhoff actually abandoned his alleged invention before he made application for letters patent thereon; and this defendant further says on information and belief that the speculums manufactured and sold by him are different in kind from that described in said letters patent set up in complainant's bill and in specification annexed thereto, and that he has not infringed upon the rights and privileges alleged in said bill to be secured to complainant in said letters patent.

9 Therefore defendant humbly submits and insists that under the facts and circumstances as above alleged the said complainant has no right to any further or other answer to said bill or any part thereof than is given above, and no right of injunction, account, and relief as prayed for in said bill of complaint, and he therefore asks to be hence dismissed with his reasonable costs and expenses in this behalf incurred.

A. BINSWANGER,
Defendant's Solicitor.

STATE OF MISSOURI, } ss:
City of St. Louis, }

On this 3d day of May, 1886, before me, a notary public, personally appeared Albert S. Aloe and made oath that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are admitted therein or stated to be based on information and belief, and as to these matters he believes it to be true.

ALBERT S. ALOE.

Subscribed and sworn to before me this 3d day of May, A. D. 1886.

JULIUS ROBERTSON,
[SEAL.] *Notary Public, City of St. Louis, Mo.*

10 Circuit Court of the United States for the Eastern District of Missouri.

ALEXANDER W. BRINKERHOFF
vs.
ALBERT S. ALOE. } No. 2594. In Equity.

Replication. Filed May 18, 1886.

The replication of Alexander W. Brinkerhoff, complainant, to the answer of Albert S. Aloe, defendant.

This repliant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith—

That he will aver and prove his said bill to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and prays as in and by his said bill he hath already prayed.

ALEXANDER W. BRINKERHOFF.
LEE, BROWN AND LEE, *His Solicitors.*

11 In the Circuit Court of the United States for the Eastern District of Missouri.

Bill of Revivor. Filed April 1, 1887.

To the Honorables David J. Brewer and A. M. Thayer, the judges of the circuit court aforesaid:

Your orators, Milford H. Brinkerhoff and Willie C. Brinkerhoff, of Upper Sandusky, who are citizens of Ohio and resident in the county — Wyandot and State of Ohio, respectfully submit unto your honors that on or about the 21st day of January, A. D. 1886, one Alexander W. Brinkerhoff, late of Upper Sandusky, in the county of Wyandot and State of Ohio, but now deceased, exhibited his original bill of complaint in this honorable court against Albert S. Aloe as defendant thereto, stating herein as is stated and praying—

That said Aloe might be made a party defendant thereto; that your writ of subpoena might issue against him out of chancery to the marshal of said eastern district of Missouri, and that the said Aloe make full answer to said bill.

That said Alexander W. Brinkerhoff might have the temporary or provisional injunction of this court, pending said bill, and on final hearing thereof its perpetual injunction, restricting said Aloe and all others, his servants, clerks, and employees, from directly or indirectly making and using or vending to others to be used the said invention or improvement or any speculums embodying the same, as alleged in his said bill.

And also that said Alexander W. Brinkerhoff might have
12 against said Albert S. Aloe a full account of profits and gains that had come to said Aloe or that might, pending said bill, come to him from the manufacture, use, or sale of said speculums or said invention and improvement, and for other and full relief.

That process was duly issued against the said Albert S. Aloe, who appeared and put in his answer to the said bill, to which the said Alexander W. Brinkerhoff put in his replication, and afterwards depositions in said cause were taken by said complainant.

That said Alexander W. Brinkerhoff, on or about the 13th day of March, A. D. 1887, departed this life testate; that your orators were nominated as executors in and by the last will and testament of said Alexander W. Brinkerhoff, which has been duly and legally admitted to probate in the probate court of Wyandot Co., Ohio, where said deceased was domiciled at the time of his death, and your orators have been duly appointed and confirmed as executors of said last will and testament and in all respects become and are qualified to act and are acting as the sole executors of said last will and testament, and they have become and are the sole legal representatives of said Alexander W. Brinkerhoff, deceased.

A duly authenticated copy of said appointment is herewith filed, marked "D."

That said suit and proceedings having become abated by the death of said Alexander W. Brinkerhoff, your orators are, as they are advised, entitled, as such personal representatives of the said Alex-

ander W. Brinkerhoff, to have the said suit and proceedings revived against the said Albert S. Aloe and to have the said cause in the same state and condition as the same was previous to the death of the said Alexander W. Brinkerhoff.

Your orators therefor- pray process of subpœna to revive against the said Albert S. Aloe, and that the said suit and proceed-
13 ings which so became abated as aforesaid may stand revived and be in the same plight and condition as the same were in at the time of the death of said Alexander W. Brinkerhoff, or that the said Albert S. Aloe may show good cause to the contrary, and further to stand and abide such order and decree in the premises as to your honors shall seem meet; and your orators shall ever pray.

MILFORD H. BRINKERHOFF AND
WILLIE C. BRINKERHOFF,
By J. C. LEE.
LEE & BROWN AND
J. C. SMITH, *Their Solicitors.*

Clerk will issue to the marshal for the eastern district of Missouri proper process of subpœna against the def't, Albert S. Aloe, to appear and show cause, etc.

J. C. LEE,
Of Counsel for Ex'rs.

EXHIBIT "D."

THE STATE OF OHIO, } *ss:*
Wyandot County, }

I, D. D. Clayton, judge of the probate court within and for said Wyandot county, in the name and by the authority of the State of Ohio do by these presents make known that in said probate court, at Upper Sandusky, on the 19th day of March, one thousand eight hundred and eighty-seven, the last will and testament of Alex. W. Brinkerhoff, late of Upper Sandusky, in said county, deceased, was duly proved and allowed by said court, and that the administration of all and singular the goods, chattels, rights, and credits of the said deceased any way concerning his last will and testament was committed to Milford H. Brinkerhoff and Willie C. Brinkerhoff, in the county aforesaid, the executors in the said will and testament named; and the said executors, 1st (inventory and appraisement is
14 dispensed with by will), shall administer according to law and to the will of the testator all his goods, chattels, rights, and credits, and the proceeds of all his real estate that may be sold for the payment of his debts or legacies which shall at any time come to their possession or to the possession of any other person for them, and, 3d, shall render upon oath a just and true account of their administration within eighteen months and at any other times when required by the court or the law, and failing so to do for thirty days after he shall have been notified of the expiration of the time by the probate judge he shall receive no allowance for services

unless the court should enter upon its journal that such delay was necessary and reasonable.

And we do hereby appoint the said Milford H. Brinkerhoff and Willie C. Brinkerhoff executors of all and singular the said goods, chattels, rights, and credits which were of the said Alex. W. Brinkerhoff, deceased.

In testimony whereof I have hereunto affixed the seal [SEAL.] of said court, at Upper Sandusky, in said county, this 19th day of March, A. D. 1887.

D. D. CLAYTON,
Probate Judge.

THE STATE OF OHIO, } ss:
Wyandot County, }

I, D. D. Clayton, judge and *ex officio* clerk of the probate court of said county, hereby certify that the foregoing is a true copy of the letters testamentary issued by the said court to the said executors.

In testimony whereof I have hereunto set my hand and the seal of the said court this 22nd day of March, A. D. 1887.

D. D. CLAYTON,
[SEAL.] *Probate Judge, W. C., O.*

15 Circuit Court of the United States, Eastern District of Missouri.

ALEXANDER W. BRINKERHOFF, Complainant,
vs.
ALBERT S. ALOE, Defendant. } In Equity. No. 2594.

Depositions for Complainant. Filed November 4, 1886.

The defendant, Albert S. Aloe, will take notice that the complainant will begin at 2 o'clock p. m. of Friday, the fifteenth day of October, A. D. 1886, at the residence of the complainant, Dr. A. W. Brinkerhoff, in Upper Sandusky, Wyandot county, Ohio, to take depositions in his behalf in the above-entitled cause and continue with witness- at that point until examined; that said testimony will be taken by and before Almon Hall, a United States circuit court commissioner for the northern district of Ohio, and that the witnesses to be examined will be the complainant, Dr. Alexander W. Brinkerhoff, his wife, —— Brinkerhoff, and his sons, Milford Brinkerhoff and Frank Brinkerhoff. You are invited to be present and cross-examine the witness- if you desire.

LEE, BROWN AND LEE,
Complainant's Solicitors.

Received a copy of the above notice this 4th day of October, A. D. 1886, and all objection to length of time of notice is hereby waived.

A. BINSWANGER,
Att'y for Def't Aloe.

16 United States Circuit Court, Eastern District of Missouri.

ALEXANDER W. BRINKERHOFF
vs.
ALBERT S. ALOE.
} No. 2594. In Equity.

Depositions of Witnesses Taken in the Above-Entitled Cause Pursuant to the Notice Hereto Attached.

Present: For complainant, John C. Lee; for defendant, F. E. Gresell.

ALEXANDER W. BRINKERHOFF, of lawful age, being produced, sworn, and examined, testified as follows:

Ques. 1. Are you the complainant in this cause, and what is your age and place of residence?

Ans. I am complainant in this cause. My age is sixty-five years; place of residence, Upper Sandusky, Wyandot Co., Ohio, where I have resided for the last twenty-nine years.

Ques. 2. About when was it that you first began the treatment and investigation of rectal diseases?

(Question objected to.)

Ans. The last of January, 1878.

Ques. 3. From that time until the present what has been your main or principal employment?

Ans. The practice of rectal treatment only.

Ques. 4. When, if at all, was it that you first conceived the idea or invention of a rectal speculum for the discovery, examination, and treatment of rectal diseases, in which there is found a slot and slide of the full length of the diameter of the chamber of the speculum and of the same width throughout their length?

(Objected to.)

17 Ans. I conceived the design of such speculum the last of March or first of April, 1878.

Ques. 5. What fact or circumstances suggested or led you up to the conception or invention of such speculum?

(Objected to.)

Ans. The treatment of piles externally after forced extrusion of the pile tumors and when filled with blood and forced back into the rectum at time of treatment often made the suffering intense for several days after treatment. I was also satisfied that there were other diseases of the rectum which could not be seen without a speculum and worse in their effect upon the human system than piles, to discover which and to treat pile tumors without being expanded or filled with blood, thereby to overcome subsequent pain after treatment, led me to devise some means whereby both could be treated when located within the rectum, to do which a tubular chamber with a slot in its side containing or closed by a slide became neces-

sary in making such examination and performing such treatment; hence the speculum patented to me March 2, 1880.

Ques. 6. When, if at all, did you make the first drawing or model of such speculum as you describe in your first application to the Patent Office, filed therein July 20th, 1878?

Ans. My first step was to whittle out a model out of a pine stick the last of March or first of April, 1878, and the first drawing from that wooden model was made at Kenton, Ohio, by Harvey Howland at my request. He was a professional draftsman. Mr. Howland made duplicate drawings, one copy of which I sent to the Patent Office, the other to Codman & Shurtliff, instrument-makers, of Boston, Mass. The drawings were made in April, 1878.

Ques. 7. What became of or where is now that wooden model that you thus whittled out from which the drawings were so made?

18 Ans. I never saw it since I left it in the draftsman's room in Kenton.

Ques. 8. How came it that the draftsman that you secured to make these drawings was one that you found at Kenton, Ohio?

(Objected to.)

Ans. I was an itinerant practitioner of rectal treatment, and Kenton was one of my points visited regularly, and when there I was invited by him to his room to examine some portraits sketched by him, seeing which induced me to ask him if he could make my drawings from my wooden models.

Ques. 9. About when, if at all, was the first speculum made after the drawings above referred to and by what manufacturer?

Ans. The first one was made by Codman & Shurtliff, Boston, Mass. I always thought that I got it in May, 1878, but it may have been June, and from it I prepared my first specifications, which I sent to the Patent Office from Marion, Ohio, on the 17th of July, 1878.

Ques. 10. I will now call your attention to pages 3, 4, 5, 6, and 7 of the document marked Exhibit A, which is now presented to the commissioner to be filed with and made part of your deposition herein, and after having examined said pages you may state whether or not they contain the specifications referred to in your last previous answer and your oath verifying the same.

(Objected to.)

Ans. I have *send* them over; they contain my specification and oath referred to in my last preceding answer.

Ques. 11. By whom were those specifications prepared and written up, and how came the oath to be administered by a notary public at Marion, Ohio?

(Objected to.)

Ans. They were written up by myself and verified at Marion, Ohio, because I had no week day time at home to have it done.

19 Ques. 12. In said specifications and at the top of page 5 you speak of six different figures or drawing- as accompanying such specifications. You may state whether as a matter of fact such figures or drawings or any of them did in fact accompany or were attached to or filed with such specifications at the time they were so sent to and filed in the Patent Office, and, if not, what were the facts touching the making and filing in the Patent Office of such drawings.

(Objected to.)

Ans. There is a rule of the Patent Office admitting drawings with black lines only. The copy of drawings made at Kenton, Ohio, was made with India ink and were not made for official copies, but simply as reference until my case was fully prepared. The slide in Fig. 4 in copy sent, made at Kenton, Ohio, was entirely closed, and when I was ready to file the case complete I procured drawings made by the draftsman's department in the Patent Office, which I paid the draftsman in Washington for making, and which were filed as official drawings in the case October 10th, 1878.

(Answer objected to.)

Ques. 13. If you have in your possession any communication from the Commissioner of Patents showing the time and the fact of filing such drawings in the Patent Office, you may now present the same to the commissioner to be filed and properly marked and attached as part of this deposition.

Ans. Witness produced paper attached hereto and filed herewith, marked Exhibit "B," which he says he received by course of mail from the Commissioner of Patents.—A. H., U. S. commissioner.

Ques. 13½. In the specifications purporting to be verified July 17th, 1878, forwarded to the Patent Office from Marion, Ohio, there does not appear to be any allusion to or description of an in-
20 cline in the chamber of the speculum near the inner end, and the description of the slot and the slide are such that the slide would extend clear to the smaller or taper end of the speculum, whereas the drawings appearing upon your patent number 224,991 show an incline in the chamber of the speculum and show the slide near the tapering end of the speculum to be cut off transversely near the upper end of the incline. You may now state when, if at all, with reference to the time you sent from Marion, Ohio, the specification to the Patent Office, the incline in the speculum was first devised or put in.

(Objected to.)

Ans. The day I sent the papers from Marion I got my speculum and tried it next day at Delaware, Ohio. I found that the tumor would expand in the chamber after the operation and would not come out through the slot. I then took it, the speculum, to a silversmith and had the incline put in.

Ques. 14. Who devised or suggested the putting in of the incline above spoken of?

Ans. Myself only.

Ques. 15. Do you know what material the silversmith — in making or putting in that incline?

Ans. I do. I selected for him an old watch-case amongst his rubbish, then cut out of a card a piece just the shape desired for the incline, which he used in forming the metal piece, then soldered it in.

Ques. 16. If you are able to do so, you may give us the name of the workman who so put in the slide for you.

Ans. I never saw him before or since, and never heard his name.

Ques. 17. Please state what, if anything, was done thereafter and prior to October 10th, 1878, by you in the way of causing a change in the drawings you were about to have made in respect to this incline or in the specula that you thereafter had made.

(Objected to.)

21 Ans. During that summer we ordered several specula to be made for other parties. All were ordered with the incline put in, and previous to October 10th, 1878, I ordered through the Commissioner of Patents official drawings for the device, and directed slide B in Fig. 3 of the drawings attached to the patent No. 224,991 drawn back and the inner end of the slide cut off transversely, as appears in said figure. I also gave them directions to mark the incline on the inside of the chamber K, which appears in the specification, but they neglected to put it in the drawings.

Ques. 18. After the filing in the Patent Office of the drawing referred to in the letter of the Commissioner of Patents of October 10th, 1878, were any other or new drawings filed at any time before the issue to you of your patent, or were those drawings in any way changed or amended after October 10th, 1878?

(Objected to.)

Ans. There were no new drawings filed and no amendments or changes were made after that date.

Ques. 19. In the document marked Exhibit A there appears on page 8 the copy of a communication from yourself to the Commissioner of Patents of date Aug. 1st, 1878, purporting to be written at Upper Sandusky, Ohio, in which you say, "I this day return yours of June 7th and July 25th, and also postal order for $11 for drawings for boot and shoe speculum and needle applications." Will you state what speculum this communication had reference to?

(Objected to.)

Ans. To this speculum here, the only one for which I ever made application for a patent.

Ques. 20. On page 10 of the same document, Exhibit, A is a copy of communication from yourself to the Commissioner of Patents, written July 5th, 1879, from Portsmouth, Ohio, in which you in substance request that the drawing in case of your application
22 for patent on improved rectal speculum be sent to you at Upper Sandusky, to enable you to amend your specification

to meet the requirements of the Patent Office. You may now state whether such drawings were sent you in compliance with that request; and, if so, whether they were by you returned again; and, if so, when.

(Objected to.)

Ans. They were sent to me and they were returned by mail July 13th, 1879, from Upper Sandusky.

Ques. 21. At the time they were so returned you may state whether or not amended specifications and claims were by you returned with the drawings; and, if so, whether the copy of specifications and claims found on pages 12, 13, 14, and 15 of Exhibit A is a correct copy of such specifications and claims.

(Objected to.)

Ans. I did return amended specifications and claims with the drawings, and the copy referred to is correct.

Ques. 22. You may now examine pages 16, 17, and 18 of Exhibit A and state whether or not they contain correctly an amendment of your specifications in the application made by you to the Patent Office for a patent for an improved speculum, and which purports to have been so made August 20, 1879.

(Objected to.)

Ans. Yes; this is a correct copy of the amendment that was sent in at that time.

Ques. 23. In each of these two amendments of the specifications in your application for such patent there appear but two claims, which are somewhat different from either of the claims in your first application and do not contain the third claim in the specifications forming a part of your patent 224,991. Can you explain how it occurred or why it was that there was in third claim in either the 1st or 2d amended specifications?

(Objected to.)

Ans. Before writing any specification I always study up the
23 case and prepare my claims on separate slips to see what I can get, or I did when I was traveling, and then select from them the claims I wish to apply for, and this amendment with the two claims was prepared by me at Portsmouth, Ohio, from such slips after midnight and when very tired, and I sent them to the Commissioner of Patents. I got hold of the wrong slip, some of the slips having three claims written on them and others having but two claims written on them. My mistake was in getting a slip with only two claims on it.

(Answer objected to.)

Ques. 24. The further taking of this deposition is continued until to-morrow morning at 9 o'clock.

ALMON HALL,
U. S. Com'r.

SATURDAY MORNING, *October 16th*, 1886.

The taking of these depositions is here resumed pursuant to the foregoing adjournment.

ALMON HALL,
U. S. Commissioner.

Answer to 24th question continued. So far my answer refers to claims in the second amendment to the specification. In the first amendment the third claim was intentionally dropped because of information received from the examiner that flanges were old and well known.

Ques. 25. If you can, you may state about when it was that you first learned that you had put but two claims into your second amendment of the specification.

Ans. It was after I received notice from the Patent Office that my claims were allowed; in the summer of 1879, in July, about.

Ques. 26. If you made a formal amendment to that second amended specification when did you do so, and where, if at all? Is there a copy of that amendment?

24 Ans. January 6th, 1880; the copy is on page 21 of document, Exhibit A.

Ques. 27. You may examine on pages 24 and 25 the copies of file-marks purporting to show the dates of the filing of the different papers constituting the file record in the Patent Office — No. 224,991, and after having done so you may state whether or not such dates are or are not, according to your recollection, approximately correct.

(Objected to.)

Ans. As to the date of some of these entries I cannot be positive, but they all seem to be in accord with my recollection of the facts.

Ques. 28. Of what material was the speculum made into which you caused the incline to be inserted, as you have stated, at Delaware, O., about August 18th, 1878?

Ans. It was made of sheet brass, silver-plated.

Ques. 29. What has become of that speculum, if you know?

Ans. This speculum that I now produce to the commissioner to be attached to this my deposition is the identical speculum.

(The instrument referred to is marked for identification Exhibit C and signed by the commissioner October 16th, 1886.)

Ques. 30. Of what material was the slide in that speculum made? And you may state also whether or not the same slide that was first used in it is the same slide that now is in it as you deliver it to the commissioner.

Ans. My opinion is that the slide is of nickel and it is the same slide that was in it when it was first received and used.

Ques. 31. What change, if any, has been made in the slide, in its shape or size; and, if any, when?

25 Ans. The only change made in the slide is filing off the inner end to correspond with the end of the chamber, and

it was done very soon after the incline was put in the end of the chamber, I think at my first visit home after the incline was put in.

Ques. 32. Before the incline was put in at Delaware, describe how the inner end of the slide compared with and fitted upon the inner end of the speculum.

Ans. The inside surface of the slide was filed off sufficiently to rest upon the upper part of the shell and extended over to the shell, forming a round end.

Ques. 33. You may state whether or not the material forming the incline or the incline itself is the same or a different incline from that which was put in about August 18th, 1878.

Ans. It is the same.

Ques. 34. There seems to be now a crack or seam between the material composing the incline and that of the shell of the speculum at its inner end; is that crack or seam the true boundary between the incline and the shell of the speculum as originally made?

Ans. That is the true boundary between the two as it was when the incline was originally put in.

Ques. 35. What treatment, if any, in the way of plating has the speculum proper received since August 18th, 1878?

Ans. It has been replated twice, once in New York by Tieman & Co. and once in Toledo by Mac—— somebody, whose name I can't remember.

Cross-examination by Mr. GRISELL:

Ques. 1. How long had you been engaged in your special treatment of rectal diseases when you conceived the idea of this speculum?

26 Ans. About two months.

Ques. 2. During that time had you used any speculum in the treatment of such diseases?

Ans. I tried to use one, but could not find any that I could use successfully.

Ques 3. What kind did you attempt to use?

Ans. The bivalve, which is a two-bladed speculum—two half shells closing together and expanded by handles, the shells being hinged together at their outer ends.

Ques. 4. Had you made any examination or investigation of any other speculums to be used in that practice?

Ans. I had. When I saw the necessity of an examination of the rectum and failed to do anything with the bivalve I wrote to S. A. Wing, of Newark, O., from whom I obtained the Mitchell treatment of hemorrhoides, asking him what speculum he used. His reply was, "I never found one that I could treat through." I then sent to Philadelphia and secured Prof. Allingham's English work on diseases of the rectum, in which was the cut of the speculum invented and used by him, and in explaining which he said he never had found a speculum which he could use in rectal treatment except his own. Therefore my invention as a result.

Ques. 5. Can you describe Dr. Allingham's speculum? If so, please do so.

Ans. Dr. Allingham's speculum was a hard rubber tube, slotted through its side, without a slide, the slot being widest at its outer or larger end, and corners of tube at small end rounded, used by inserting a closely fitting plug with a rounded end projecting beyond the speculum before inserting into the rectum; when inserted the plug was withdrawn and examination was attempted to be made.

Ques. 6. Why do say "attempted to be made"?

27 Ans. Because in many cases no examination could be made at all with said speculum.

Ques. 7. Did you learn that from Dr. Allingham's book, describing the speculum and its use, or from actual observation of the instrument itself?

Ans. I did not from his book, but I did from my opinion of the instrument, as well as from the use of my own instrument, after its invention, by trying its use as Allingham used his.

Ques. 8. Did you ever see one of Allingham's speculums?

Ans. I never did.

Ques. 9. From the description you obtained from his book is it not a fact that the speculum, including slot, is substantially the same as your own?

Ans. It is not.

Ques. 10. From whom did you obtain your special mode of treating rectal diseases?

Objected to—irrelevant and incompetent.

Ans. From no person. It was the outgrowth of my own experience and investigation.

Ques. 11. What elements go to make up your instrument?

Ans. The tube, with its slot; the slide, with its handle, and the incline in the front or inner end of the chamber.

Ques. 12. What is there new about the tube and slot?

Ans. There is nothing absolutely new about a slotted tube, but there is something new in a slot extending throughout the length of the chamber, of like width throughout its length, and fitted by a closely fitting slide.

28 Ques. 13. The tube itself is old and the slot is also old, are they not?

Ans. They are.

Ques. 14. In the instrument described by Allingham did not the slot extend the entire length of the instrument, as in this?

Ans. It did.

Ques. 15. Is it not a fact that a slide is a very common and old device?

Ans. Not very common, and I hadn't found anything older than the use of mine.

Ques. 16. In other departments of art and mechanics is not a slide a very common and old device?

Ans. Yes; in sewing-machines they have been used for many years to shut holes; so in other devices.

Ques. 17. Is that not where you got the idea of the use of a slide in this machine or instrument of yours?

Ans. I did not.

Ques. 18. In the combination of these elements, the tube with the slot, the slide, and the incline, to form this machine there is no blending of one element within another; they remain independent elements, do they not?

Ans. In use they are combined and blended; when separated neither one could be used.

Ques. 19. In the construction of your device is there any blending of these elements, the tube with the slot and slide and incline, and do they not remain separate and distinct elements?

Ans. There is a complete blending (if I understand the meaning of this term blending) of elements simple and complete in themselves. They do not remain separate and distinct elements when combined.

29 Ques. 20. Is the instrument that is manufactured and sold by you the same in all respects as the one described in this patent?

(Objected to as immaterial.)

Ans. Absolutely the same in every particular, excepting one—excepting a slight elevation of metal on the top of the end of the speculum beyond the end of the slide.

ALEXANDER W. BRINKERHOFF.

ADOLPH BILLHARDT, of lawful age, being produced, sworn and examined, testified as follows:

Ques. 1. Please give your age, place of residence, and in what you were engaged in 1878.

Ans. Age, 53; residence, Upper Sandusky. In 1878 I was selling drugs, running a drug store.

Ques. 2. If you remember, you may state whether you procured Codman and Shurtliff, of Boston, Mass., to manufacture for Dr. A. W. Brinkerhoff, in the year 1878, a rectal speculum. Please state about what time you received and delivered to Dr. Brinkerhoff each speculum, and also who furnished the design, model, or drawing for such speculum.

Ans. I did, from Codman & Shurtliff, a rectal speculum for Dr. Brinkerhoff, which was designed by Dr. Brinkerhoff. I received and delivered the speculum to him about June 15th, 1878.

Ques. 3. By what mode of transportation was that speculum sent to you by Codman and Shurtliff?

Ans. By mail.

30 Ques. 4. If you have the original bill of purchase made to you by Codman & Shurtliff at the time said rectal speculum was furnished by them, you may produce and deliver it to the commissioner to be attached to and made part of this your deposition.

(Objected to.)

Witness produces and presents to the commissioner bill marked Exhibit D, attached hereto and made part hereof.

A. BILLHARDT.

MILFORD H. BRINKERHOFF. of lawful age, being produced, sworn, and examined, testified as follows:

Ques. 1. Give your name, age, residence, occupation, and what relation, if any, you sustain to the plaintiff, A. W. Brinkerhoff.

Ans. My name is Milford H. Brinkerhoff; age, 37 past. I reside in Upper Sandusky, Ohio; occupation, merchant in musical merchandise. I am a son of the pl'ff.

Ques. 2. What facilities have you had, if any, to know the character, nature, and construction of the rectal speculum made under the direction of your father from time to time?

Ans. I have had such facilities as would exist under the circumstances of being a partner in the musical business with pl'ff and having more or less charge of his correspondence.

Ques. 3. State fully what you know, if anything, about the model or drawing for the construction of a speculum by Codman and Shurtliff, of Boston, for your father.

(Objected to.)

Ans. About the drawing I know personally nothing. I do know that they constructed for him something during the summer of 1878, a speculum which was made to his order, and thereafter during the same season they made several others after the same pattern. I don't know that I ever saw the model.

31 Ques. 4. How early in 1878 did you, if at all, see the speculum made for your father by Codman and Shurtliff in that year?

(Objected to.)

Ans. I cannot state specifically the exact date, but it was previous to September of that year.

Ques. 5. You can state this, perhaps, whether the first speculum obtained from Codman and Shurtliff did or not contain the incline at the inner end of the chamber when you first saw it.

Ans. It did.

Ques. 6. You may state, if you can, at what time your father began to treat rectal diseases as a practitioner going from place — through Ohio and elsewhere.

(Objected to.)

Ans. During the first half of 1877, according to my recollection.

Ques. 7. If you know, you may state what instrument or instruments in the way of speculum he was using during the year 1878.

Ans. I never knew him to use any except one invented by himself and manufactured for him by Codman & Shurtliff, of Boston.

Cross-examination:

Ques. 1. Do you know that your father used any instrument at all in 1878?

Ans. I do.

MILFORD H. BRINKERHOFF.

WILLIAM C. BRINKERHOFF, of lawful age, being produced, sworn, and examined, testified as follows:

Ques. 1. What is your name, age, place of residence, and occupation, and what your relation, if any, to the plaintiff, A. W. Brinkerhoff?

32 Ans. My name is Wm. C. Brinkerhoff; age, 25; residence, Upper Sandusky; occupation, physician, practicing specially rectal diseases, and am a son of plaintiff.

Ques. 2. Where were you and how engaged during the years 1877 and 1878?

Ans. Until April, 1877, I was in school. From that time until September, 1878, I was employed as a clerk in a queensware store at that time managed by my brother. I again entered school and remained there during the balance of the year.

Ques. 3. During those years 1877 and 1878 where were you boarding, in your father's family or elsewhere?

Ans. In my father's family.

Ques. 4. You may now look at the speculum and slide marked Exhibit C in this case and state when you first saw this identical speculum and slide, if you now remember, and whether when you saw it first it was the same as it now is in design and structure or different from what it now is.

(Objected to.)

Ans. I saw it during the summer of 1878. It was same as now when I first saw it.

Ques. 5. In whose possession was it and where when you saw it?

Ans. It was in my father's possession. It was at one of two places in Upper Sandusky, the store or the house.

Cross-examination:

Ques. 1. If there was no mark upon that speculum that you hold in your hand to identify it as the one you referred to *as* the testimony in this case could you positively say it is the same one you saw in your father's possession in 1878?

Ans. If this is not the one the one I saw then was identically the same in construction.

33 Ques. 2. Was your attention so called to that one you saw in 1878 that you can now accurately remember its construction?

Ans. It was.

WILLIAM C. BRINKERHOFF.

UNITED STATES OF AMERICA, }
Northern District of Ohio. }

I, Almon Hall, a United States circuit court commissioner in and for said district, duly commissioned and qualified, do hereby certify that the foregoing-named Alexander W. Brinkerhoff, Milford H. Brinkerhoff, William C. Brinkerhoff, and Adolph Billhardt were by me severally sworn to testify the truth, the whole truth, and nothing

but the truth, and that the depositions by them respectively subscribed as above set forth were reduced to writing by me in their presence, and were read over by me to said witnesses and were subscribed by said witnesses in my presence, and were taken at the time and place specified in the annexed notice and continued from day to day as set forth.

I do further certify that I am not counsel, attorney, nor relative of either party to this suit nor interested in the event of the same.

I do certify that my fee of $28.10 for taking said depositions has been paid to me by plaintiff.

ALMON HALL,
United States Circuit Court Commissioner,
Northern District of Ohio.

34 EXHIBIT "A." Almon Hall, U. S. Com'r.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, Greeting:

This is is to certify that the annexed is a true copy from the files of this office of the file-wrapper and contents in the matter of the letters patent granted Alexander W. Brinkerhoff March 2nd, 1880, number 224,991, for improvement in rectal speculum.

In testimony whereof I, M. V. Montgomery, Commissioner of Patents, have caused the seal of the Patent Office to be affixed this 9th day of October, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and eleventh.

[SEAL.]

M. V. MONTGOMERY,
Commissioner.

Petition.

To the Commissioner of Patents:

Your petitioner prays that a patent may be granted to him for the invention set forth in the annexed specification.

ALEXANDER W. BRINKERHOFF.

Oath.

STATE OF OHIO, }
County of Marion, } *ss:*

On this 17th day of July, 1878, before me, the subscriber, a notary public in and for said county, personally appeared the within-named Alexander W. Brinkerhoff and made solemn oath that he verily believes himself to be the original and first inventor of the rectal speculum herein described, and that he does not know or
35 believe that the same was ever before known or used, and that he is a citizen of the United States of America.

[SEAL.]

J. E. DAVIDS,
Notary Public, Marion County, Ohio.

To whom it may concern:

Be it known that I, Alexander W. Brinkerhoff, of Upper Sandusky, in the county of Wyandot and State of Ohio, have invented new and useful improvements in rectal speculas "for discovering hemorrhoidal tumors," and I declare the following to be a full, clear, and exact description thereof, reference being had to the accompanying drawings making part of this specification, and to the letters marked thereon:

1. Figure 1 is a perspective view of the same.
2. Figure 2 is a perpendicular view showing spread of handles.
3. Figure 3 is a view resting on one handle showing slide drawn.
4. Figure 4 shows it in use with tumor entered, and mode of operating.
5. Figure 5 shows an end view with slide removed and handles off.
6. Figure 6 shows a sectional-end view of slide through line *x x*, Fig. 3.

ALEXANDER W. BRINKERHOFF.

Witness:
J. E. DAVIDS.
M. BUNELL.

36 UPPER SANDUSKY, O., *Aug.* 1, 1878.

The Hon. Com. of Patents, Washington, D. C.

DEAR SIR: I this day return yours of June 7 and July 25th; also postal order for $11.00, for drawings for boot and shoe, speculum, and needle application.

I also send amended claim—or rather new claim—on needle.

Hoping to hear soon in reply and receive drawings, I am,

Resp't'y, ALEXANDER W. BRINKERHOFF.

All communications should be addressed to "The Commissioner of Patents," Washington, D. C.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE,
WASHINGTON, D. C., *July* 2*d*, 1879.

Alexander W. Brinkerhoff, Upper Sandusky (Wyandot Co.), Ohio.

Speculum. Filed June 28, 1879.

Applicant is referred to the catalogue of G. Tieman & Co., 1872, page 62, of Gynæcological Instruments, figures 200 and 201, and page 68, Fig. 222, from which he will see that a slot of the same width, throughout its length, is common in a tubular speculum. Many other references can be given if desired. Very few speculums of this character are made without the flanch or rim around upper part of tube. Applicant should set forth any utility in having the slot closed by a sliding piece instead of the usual rotating, and

should confine himself to a single claim for his exact con-
37 struction. On third page of specification applicant should erase from line 14 to 27, as this is a mere advertisement and wholly unnecessary.

A. G. WILKINSON, *Examiner.*

PORTSMOUTH, O., *July 5th*, 1879.

The Hon. Com'r of Patents, Washington, D. C.:

Please mail to me, directed to Upper Sandusky, O., the drawing in case of my application for patent on improved rectal speculum, so that I may be able to amend my specification to meet the requirements of your office.

The drawings were made by the Patent Office and I have never seen them; hence the importance of having them now.

I know it is contrary to the rules to return papers, but this, having a true copy in the office, I presume would not come under that rule, and I, being the inventor and not an attorney, can have no bad motives in asking it.

Please return at once, so I can get it on 12th inst., when at home.

Respectfully, ALEX. W. BRINKERHOFF.

UPPER SANDUSKY, O., *July 13th*, 1879.

Commissioner of Patents, Washington, D. C.

DEAR SIR: I herewith return drawings and amendments in my application for improvement in speculas, which I trust will meet the approbation of the office. I am too hard pressed for time to do full justice to this business, and yet too poor from recent misfortunes to hire it done.

38 You will observe that a slight amendment, to correspond with model, must be made in drawings, Figs. 3 and 4. Please add incline K before examination (see end of chamber in model).

Truly, ALEXANDER W. BRINKERHOFF.

All communications should be addressed to "The Commissioner of Patents, Washington, D. C."

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE,
WASHINGTON, D. C., *July 29th*, 1879.

Alexander W. Brinkerhoff, Upper Sandusky, Wyandot county, Ohio:

Speculum. Filed June 28th, 1'79.

Presumably applicant's claims are allowable, but before this is finally decided applicant should radically change his specification. The Patent Office cannot sanction by its issue of a patent a wholesale condemnation of one sort of speculum or give a lengthy advertisement of what an applicant considers superior in his own instrument. The instruments which applicant denounces in his specification are in use and approved of by leading surgeons of reputation. Applicant should confine himself strictly to setting forth the

differences which he claims, and should, of course, omit any personal account of how he himself treats diseases. Applicant can at once see the confusion that would arise if each inventor could call all other inventions worthless and advertise his own in his specification.

A. G. WILKINSON, *Examiner.*

39 To the Hon. Commissioner of Patents, Washington, D. C.:

I hereby amend my specification for improved speculas by erasing all after the words "the nature of my invention" and substituting the following, viz:

Consists in the use of a slide extending through the length of one side of the tube and an incline inside of the forward or small end of the chamber to prevent injury to the membrane while withdrawing the instrument, and to prevent the impaction of pile tumors and enlarged glands in its end, and thereby preventing its withdrawal only with difficulty and danger.

To enable others to make and use my invention who are skilled in the art, I will proceed to describe the same more fully and clearly:

My speculum is made of metal and plated in the usual manner to secure a bright interior and smooth surface; in shape it is conical and has one side slotted through its entire length of chamber. Into such slot H is closely fitted a movable slide, B, having upon its rear end a handle, D, for actuating it. On the side of tube A, opposite the slide, is another handle, D, by which to hold the tube when in use.

Around the large end of tube A is a flanch or lip, C, to prevent the entrance of anal membrane or surplus skin, and in the forward end of the chamber is an incline, K, to prevent the impaction of pile tumors, enlarged glands, or surplus membrane in the end of chamber and thereby enable the operator to withdraw the instrument with safety and ease.

I am aware that slotted speculas are common, and I do not claim such as any part of my invention.

My invention differs from others in this: That while their
40 sides are open from end to end when the examination is made in the rectum and the abnormal parts enter through the entire length at once, the lower end often becoming entirely closed first and cutting off all view of the upper part; mine only admits such parts through the opening as made by slowly drawing the slide downward, even to the anal orifice, if desired, the adjustable slide enabling me to keep out all desired below its inner end and admit what is to be examined without any obstruction to the view.

Some of the advantages of my invention are made clear and plain by clasping the speculum in one hand and drawing the slide with the other at the same time, with the large end toward a strong light, look in and examine the hand through the slot.

Having thus fully described my invention, its nature, mode of construction, and manner of using same, what I claim as new and desire to secure by letters patent of the United States is—

1st. A slide in the side of a speculum extending through its whole length and used substantially as herein described.

2nd. The incline in the front end of the chamber in the combination with the tube, slot, and slide, substantially as and for the purposes herein set forth.

ALEXANDER W. BRINKERHOFF.

Upper Sandusky, O., August 2nd, 1879.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE,
WASHINGTON, D. C., *August* 8, 1879.

Alexander W. Brinkerhoff, Upper Sandusky, Wyandot Co., Ohio:

Rectal speculum. Filed June 28, 1879.

Applicant's amendment was exactly in accord with the office requirements and his case has been sent to issue; of this he will receive notice from the clerk having issues in charge. 41

The paper filed with the amendment is herewith returned. All charges against officers must be made and filed separately from the record of any particular case. The applicant has probably got this case mixed with some other, as in this instance the examiner wrote a very courteous letter trying to suggest how the case could be amended without paying for the services of an attorney. The rules forbid the office suggesting attorneys to applicants. Applicant can file any charges against the examiner, but not in the record of an application for a patent.

A. S. WILKINSON, *Examiner.*

Power of Attorney.

To the Commissioner of Patents:

The undersigned, Alexander W. Brinkerhoff, of Upper Sandusky, in the county of Wyandot and State of Ohio, having on or about the 20th day of July, 1878, made application for letters patent for an improvement in rectal speculas, hereby appoints Charles D. Gilmore and J. Clement Smith, who transact business under the firm name of Gilmore, Smith & Co., solicitors of patents, of Washington, D. C., his attorneys, with full power to prosecute said application, to make alterations and amendments therein, to receive the patent, and to transact all business in the Patent Office connected therewith.

In witness whereof I have hereunto subscribed my name this 21st day of October, 1879.

ALEXANDER W. BRINKERHOFF.

In presence of—
A. WILEY.
J. G. STALEY.

Application allowed August 9, 1879.

42 To the Commissioner of Patents:

In the matter of my application for improvements in rectal speculas, filed July 20, 1878, and allowed August 9, 1879, I hereby amend my specification to make clear and more distinct my claim submitted under date of Dec. 2, 1879, as follows, viz.:

On page one, in line 4, after the word "chambers," add "C," extending from the bottom of the chamber upward and forward to the under side of the slide when in place.

Also on page one, line 23, after the words "incline K," add "D," made necessary in speculas having closed ends to prevent the entrance of fœces into the speculum.

And also the addition of the following claim to those already allowed and dated August 6, 1879, viz.:

Claim—

"E." In cylindrical tubular speculas having a slotted side and closed end to prevent the entrance of fæces, the incline in the front end of the chamber extending upward from the bottom and forward to under side of slide, substantially as described and for the purposes herein set forth.

ALEXANDER W. BRINKERHOFF.

January 6th, 1880.

In the margin of above letter appears as follows:

Recommended that the case be withdrawn and reopened for the consideration of this new claim. App'd: M. A. Doolittle, Assistant Commissioner.

A. G. WILKINSON, *Examiner.*

January 5, 1880.

43 Issue division. (2-024.) Serial No., —.

All communications should be addressed to "The Commissioner of Patents, Washington, D. C."

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE,
WASHINGTON, D. C., *Jan. 9th*, 1880.

Alexander W. Brinkerhoff, care Gilmore, Smith & Co., present.

SIR: Your application for a patent for an improvement in rectal speculum, filed June 28th, 1879, has been examined and allowed.

The final fee, twenty dollars, must be paid, and the letters patent bear date as of a day not later than six months from the time of this present notice of allowance.

If the final fee is not paid within that period the patent will be withheld, and your only relief will be by a renewal of the application, with additional fees, under the provisions of section 4897, Revised Statutes. The office aims to deliver patents upon the day of their date and on which their term begins to run; but to do this properly applicants will be expected to pay their final fees at least twenty days prior to the conclusion of the six months allowed them

by law. The printing, photolithographing, and engrossing of the several patent parts, preparatory to final signing and sealing, will consume the intervening time, and such work will not be done until after payment of the necessary fees.

When you send the final fee you will also send, distinctly and plainly written, the name of the inventor and title of invention as above given, date of allowance (which is the date of this circular), date of filing, and, if assigned, the names of the assignees.

44 If you desire to have the patent issue to assignees, an assignment containing a request to that effect, together with the fee for recording the same, must be filed in this office on or before the date of payment of final fee.

Additional copies of specifications and drawings will be charged for at the following rates: Single copies, uncertified, 25 cents; twenty copies or more, 10 cents each. The money should accompany the order.

Very respectfully,

H. E. PAINE,
Commissioner of Patents.

(6467–30 M.)

Across the face of above application appears the following in red ink:

☞In remitting the final fee give the serial number at the head of this notice.

In the margin of above application appears the following in red ink:

The within title is that given by the examiner in charge as most appropriate to your invention. Should you desire a change in the same, satisfactory reasons must be given therefor on or before the payment of the final fee.

To the Hon. Commissioner of Patents, Washington, D. C.

In the matter of my application for letters patent for improvements in rectal speculas, filed about June or July 20th, 1878, and allowed August 9th, 1879, but on which the final fee has not yet been paid, I hereby amend my spec——

Cut from original paper.

I hereby revoke any and all powers of attorney given or executed by me in this case.

ALEXANDER W. BRINKERHOFF.

Upper Sandusky, O., December 2d, 1879.

45 UPPER SANDUSKY, OHIO, *Jan'y 17th*, 1880.

Commissioner of Patents, Washington, D. C.

DEAR SIR: In the matter of my application for improvements in speculas I revoke power of attorney to Gilmer, Smith & Co., Decem-

ber 2nd, 1879, as you will see by enclosed slip, which, with other papers, was returned to me about the 10th ultimo.

Since then, by personal visit to the office, I succeeded in securing the claim desired, but have had no official notice of the allowance.

I hereby again revoke said power of attorney and ask for direct notice and correspondence.

Respectfully, A. W. BRINKERHOFF.

1878.

1828.

135.

No. 224,991.
Alexander W. Brinkerhoff,
Of Upper Sandusky,
County of Wyandot,
State of Ohio.

Rectal speculum.

Rec'd July 20, 1878.
Petition, " " "
Affidavit, " " "
Specification, " "
Drawing, Oct. 10, "
Model, June 28, 1879.
Cert. dep., —.
Cash, $15, June 28, 1879.
46 Add'l fee cert., —.
" cash, $20, Feb. 7, 1880.
Jan' 7, '89. A. G. Wilkinson.
Examined Aug. 8th, '79. A. G. Wilkinson.
Issue, Aug. 9, '79. F. A. Seely.
" Jan'y 9, '80. Arthur W. Crossley.
Patented March 2, 1880.
Circular, Aug. 9, '79.
" Jan. 9, 1880.
Speculum.

1878.

Contents.

Application papers.
1. Rej., 1, July 2, '79.
2. Att'y's letter, July 8, '79.
3. Amend't, July 18, 1879.
4. Letter, July 29, '79.
5. Amendment, Aug. 6, '79.
Returned to him not accepted.
6. Appl's letter, Aug. 6, '79.
7. Letter, Aug. 8, 79.

8. Amend't, Jan. 6, '80.
9.
10.
11.
12.
13.
14.
15.
16.
17.
18.

47 Title: Improvement in rectal speculums.

A. C. W.; S. A. P.

EXHIBIT B.

Room No. —. (No. 8.)

All communications should be addressed to the Commissioner of Patents.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE,
WASHINGTON, D. C., *October 10th*, 1878.

SIR: I have the honor to acknowledge the receipt of the drawing of your alleged improvement in rectal speculums. The papers are duly filed and your application for a patent will be taken up for examination in its order on receipt of model and fee of $15.

Very respectfully,

ELLIS SPEAR,
Commissioner of Patents.

Alex. W. Brinkerhoff, Upper Sandusky, Ohio.

NOTE.—In order to constitute an application for a patent the inventor is by law required to furnish his petition, specification, drawings (where the nature of the case admits of drawings) or specimens of ingredients and of the composition (where the invention is of a composition of matter), and to pay the required fee.

A model will also be required in all cases which admit of a representation by model.

No application is considered as complete nor can any official action be had thereon until all its parts, as here specified, are furnished in due form by the inventor or applicant.

48 EXHIBIT D.

13 AND 15 TREMONT ST., BOSTON, *Jan.* 12, 1878.

Dr. A. Billhardt, Upper Sandusky, Ohio, bought of Codman & Shurtleff, manufacturers and wholesale and retail dealers in every instrument and article used by dentists, physicians, and surgeons.

1 rectal specula to order	$7 00 net.
Postage	4
	$7 04

Mail.

ALMON HALL,
United States Commissioner.

49 Circuit Court of the United States for the Eastern District of Missouri.

ALEXANDER W. BRINKERHOFF, Plaintiff,
against
ALBERT S. ALOE, Defendant. } In Equity.

Depositions for Complainant. Filed January 20, 1887.

Notice.

The defendant will take notice that on the 4th day of January, A. D. 1887, at the residence of the complainant, in Upper Sandusky, Ohio, at the hour of 2 p. m., the complainant will proceed to take the testimony of the complainant and of J. Fuchs in the above-entitled cause, before Almon Hall, Esq., a United States commissioner for the northern district of Ohio, or before some other competent authority.

And that the taking of said testimony will be continued from day to day thereafter by adjournment, if necessary, until the same is completed; and you can be present in person or by counsel and cross-examine if you wish to.

LEE, BROWN & LEE,
Complainant's Solicitors.

Received copy of the within notice Dec. 17th, 1886.

A. BINSWANGER,
Defendant's Solicitor.

Depositions of sundry witnesses taken before me, W. A. Pool,
50 a notary public within and for the county of Wyandot, in the State of Ohio, pursuant to the annexed notice and at the time and place therein specified, to be read in evidence on behalf of the complainant in an action pending in the circuit court of the United States for the eastern district of Missouri, in which Alexander W. Brinkerhoff is plaintiff and Albert S. Aloe is defendant.

John C. Lee, Esq., being present on behalf of the plaintiff, and T. E. Grissell, Esq., on behalf of the defendant, at the time and place of taking said depositions.

JACOB FUCHS, of lawful age, being by me first duly cautioned and sworn, deposes and says as follows:

1st question. What is your name, age, and place of residence?

Ans. My name is Jacob Fuchs; residence, Hartford, Connecticut, 313 Main St.; my age is thirty-three.

2nd question. What is your occupation or calling, and how long have you followed that occupation?

Ans. Jeweler and watch-maker; I have followed that occupation for twenty years.

3rd question. In the year 1878 where were you living and where, if at all, were you working at your trade of jeweler and watch-maker?

Ans. I was living at Delaware, Ohio, and was working for Cyrus Platt.

4th question. You may state where the jewelry and watch establishment of Platt, in which you worked, was situated in Delaware.

Ans. In the American house, on the corner.

51 5th question. In working at your trade for Mr. Platt you may state whether or not your work was confined to watch-making and jewelry work only.

Ans. I worked at watch-making and soldering metals and differ- articles together.

The last above question and answer objected to by defendant.

6th question. While you were so working for Mr. Platt you may state whether or not at any time you met or saw at Mr. Platt's establishment Dr. A. W. Brinkerhoff, the complainant in this case, and who is now present in the room.

Ans. Yes, sir; I saw him.

7th question. Whereabouts were he and you when you so saw him and what business was he upon or attending to?

Ans. I saw him at Mr. Platt's store. He came in and showed me some drawings on a paper that he wanted me to make and put in some instrument he had that I don't remember the name of.

8th question. If you should see another instrument like that which Dr. Brinkerhoff then brought in can you tell whether or not you could recognize or know it?

Ans. Yes; I could recognize the instrument.

9th question. You may look at the instrument or speculum now shown you, and, having done so, you may state what you remember of the instrument Dr. Brinkerhoff then had and how it compared in design and structure with the one now shown you, if at all.

The ninth question objected to by defendant on account of being leading in form.

52 Ans. The design is about the same. The outside appearance is the same, but inside when the gentleman brought it to the store was different; so he gave me instruction to cut out a piece of metal the shape of a piece of paper he cut and gave to me.

10th question. You may now state more precisely how the inside of the instrument Dr. Brinkerhoff then brought to you differed from the inside of the instrument now shown you and hereinbefore referred to.

Ans. It was square inside. It was straight down near the end and on the inside—near the small end.

11th question. You may now state clearly what change, if any, was made upon the instrument at that time by you.

Ans. I placed a little piece of metal that I cut out of the shape of the paper given to me by Dr. Brinkerhoff in the inside of the instrument where it was square or straight down and changed it from being square or straight down to a slope.

12th question. How did you make fast, if at all, that piece of metal in that place at that time?

Ans. I soldered it in with soft solder.

13th question. After you had so made it fast you may state whether or not it was polished or smoothed before you returned it to Dr. Brinkerhoff.

Ans. It was smoothed.

14th question. If you can you may now state what the metal or material was of which that little piece was composed.

Ans. I think it was brass silvered over, probably.

15th question. When you had finished your work on it what was done with the instrument or what became of it?

Ans. I handed it back to the gentleman.

53 16th question. If you have the means of fixing about the time that you did this work for Dr. Brinkerhoff you may do so as nearly as you can.

Ans. The time must have been the last of June or in July.

17th question. After you had finished the work on that instrument how did the slope or incline in it compare with the slope or incline in the instrument now shown you and heretofore in this deposition spoken of by you?

The 17th question objected to by defendant as leading.

Ans. The same as this now that I look at.

18th question. With whom are you now employed, if with anybody, as a jeweler and watchmaker in Hartford, Connecticut?

Ans. With Ernest Schall.

19th question. How long, about, have you been employed by him?
Ans. Six years.
20th question. At whose request do you appear here in Upper Sandusky, Ohio, at this time? When did you arrive and where do you expect to go to when you leave?

Twentieth question objected to by defendant because that it is irrelevant.

Ans. I am here at the request of Dr. A. W. Brinkerhoff & Sons. I arrived on the 3d inst. and expect to return to Hartford.

The instrument attached to the deposition and marked "Exhibit A" is the instrument that this witness used in this examination in giving the description of the instrument upon which he
54 worked for Dr. Brinkerhoff and the only instrument to which his answers alluded as being present at this examination.

W. F. POOL, *Notary.*

Cross-examination:

1st question. How long did you live in Delaware, Ohio?
Ans. Three years.
2nd question. In what year did you go to Delaware?
Ans. In April, 1876.
3d question. When did you leave there?
Ans. In June, 1879.
4th question. Where did you go from Delaware?
Ans. To New York, and from there to Germany.
5th question. How long did you remain in New York?
Ans. About two weeks.
6th question. How long did you remain in Germany?
Ans. About a year.
7th question. From the time you fixed that instrument at Delaware to the present time have you ever seen a similar instrument to the one shown to you here?
Ans. No; I have not.
8th question. If you had been called upon to describe the instrument you fixed for Mr. Brinkerhoff at Delaware could you have done so from memory?
Ans. I could, a little.
9th question. If you had met Mr. Brinkerhoff away from his own place would you have remembered him as the person that brought the instrument to the store to be fixed?
Ans. I would have recognized him if he had appeared as he did at Delaware.
55 10th question. Does he appear differently to-day from what he did at Delaware?
Ans. Yes, sir.
11th question. In what respect?
Ans. He is much older. At that time he had a smooth face.
12th question. What do you remember from memory about the instrument he showed you on that occasion?

Ans. I remember the workmanship that I done on it.

13th question. Can you tell what material it was made of—the instrument itself?

Ans. Yes, sir; I should think it was made out of brass, nickel, or plated over.

14th question. Do you remember whether that instrument had a movable slide?

Ans. I think it had.

15th question. Did Mr. Brinkerhoff tell you at that time what the instrument was used for?

Ans. No, sir.

16th question. Did he tell you what he called it?

Ans. He did not.

17th question. Out of what did you obtain the piece that you soldered into the instrument?

Ans. Out of old scraps probably; we keep old broken-up watch-cases.

18th question. Do you remember out of what particular scrap or piece of metal of any kind you took this piece?

Ans. The inside cap of a broken watch-case. It was of brass.

19th question. You came here upon purpose to testify in this matter?

56 Ans. Yes, sir.

20th question. You were requested by letter to come here?

Ans. Yes, sir.

21st question. Did the letter advise you in regard to what your testimony was wanted?

Question objected — as incompetent.

Ans. Yes, sir.

Answer also objected to by plaintiff.

JACOB FUCHS.

Also at the same time came the complainant, A. W. BRINKERHOFF, who, being first duly sworn, deposes and says as follows:

1st question. What was the material out of which the speculum was made which, in your former deposition in this cause, you testified had an incline put in it at a silversmith's shop at Delaware, Ohio?

Above question objected to by defendant.

Ans. It was made out of brass and nick*le*-plated.

2nd question. Of what material is the speculum made which has been shown to and testified about by the witness, Jacob Fuchs, in his deposition to-day, taken and attached to and made a part of his deposition?

Ans. That is made of what they call solid nick*le*.

3rd question. If you have been present to-day at the time and place of the giving by Jacob Fuchs of his deposition in this case and saw and heard him testify you may state whether or not you

have seen him before to-day; and, if so, when and where you first saw him.

(The above question objected to by defendant as irrelevant.)

57 Ans. I was present to-day and saw and heard him testify. I have seen him twice before. I saw him first at Delaware in 1878 in the shop of Mr. Platt.

4th question. Under what circumstances and in connection with what matter, affair, or business was it that you saw him in Delaware, as above referred to?

The above question objected to by defendant as incompetent.

Ans. I saw him in connection with the insertion of the slope or incline in the inner end of the chamber of the speculum, as spoken of in my testimony, heretofore given in this case.

5th question. You may state who it was that did the mechanical work of inserting the incline or slope in that speculum at that time.

Ans. It was Mr. Fuchs, who is now present and whose deposition was taken here to-day.

Above question and answer objected to by defendant.

Cross-examination waived.

A. W. BRINKERHOFF.

THE STATE OF OHIO, } *ss:*
Wyandot County, }

I, W. F. Pool, a notary public in — for the county and State above named, duly commissioned and qualified, do hereby certify that the foregoing named Jacob Fuchs and Alexander W. Brinkerhoff were by me first severally sworn to testify the truth, the whole truth, and nothing but the truth, and that the depositions by them subscribed, as above set forth, were reduced to writing by myself, and by no other person, in the presence of the witnesses, respectively, who, in my presence, respectively, signed said depositions.

I further certify that said depositions were taken at the time
58 and place specified in the notice hereto attached, and that I am not counsel, attorney, nor relative of either party or otherwise interested in the event of this suit.

[SEAL.] In testimony whereof I have hereunto set my hand and official seal this 4th day of January, A. D. 1887.

W. F. POOL,
Notary Public.

Cost Bill.

To writing and certifying depositions at 20 cents per 100 words	$3 00
To swearing witnesses at 10 cents each	20
Witness fee one day	75
	$3 95

Received of Alexander W. Brinkerhoff the sum of $3.20 in full of my fees as above specified.

The witness fee of Jacob Fuchs was paid by said Brinkerhoff.

W. F. POOL,
Notary Public.

THE STATE OF OHIO, } ss:
Wyandot County, }

I, Anselm Martin, clerk of the court of common pleas of the aforesaid county and State, do hereby certify that W. F. Pool is a notary public in and for said county, whose commission bears date February 14th, 1885, and does not expire until February 14th, 1888, and that his signature above was written in my presence and is therefore genuine.

In testimony whereof I hereunto set my hand and the seal of said court, at Upper Sandusky, this 13th day of January, A. D. 1887.

[SEAL.]

ANSELM MARTIN, *Clerk.*

59 Circuit Court of the United States for the Eastern District of Missouri.

ALEXANDER W. BRINKERHOFF
vs.
ALBERT S. ALOE. } In Equity.

Depositions for Complainant in Rebuttal. Filed March 2, 1888.

The defendant will take notice that the executors of the last will and testament of the complainant, Alexander W. Brinkerhoff, and in whose name said cause has been revived, will take testimony in rebuttal, to be used on the hearing of said cause, before Darius Baker, a notary public, and at his office, 209 Thames street, Newport, R. I., beginning at the hour of 9 a. m. of the 27th day of February, A. D. 1888, and that the same will continue by adjournment, if necessary, until the testimony is all taken; that the witness to be examined at said time will be Dr. A. F. Squire, of Newport, Rhode Island. You can be present, in person or by counsel, and cross-examine if you desire.

LEE AND BROWN,
Solicitors for Comp'ts.

Received copy of the above notice this 14th day of February, A. D. 1888.

A. BINSWANGER,
Solicitor for Def't.

60 STATE OF RHODE ISLAND, } ss:
County of Newport, }

At my office, No. 209 Thames street, in Newport, in said county, at 9 o'clock in the forenoon of Monday, the twenty-seventh day of February, A. D. 1888, the taking of the testimony referred to in the

notice hereto attached as a part hereof, by consent of both of the parties to the suit therein referred to, was continued to one o'clock in the afternoon of said day at my office, as above described. At the last-mentioned hour on said day and at said office there appeared Dr. A. F. Squire, referred to in said notice, and, after being cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, gave the following deposition, which was reduced to writing by me in his presence and by him subscribed in my presence; taken at the request of Alexander W. Brinkerhoff, to be used in the trial of a suit, now pending in the circuit court of the United States for the eastern district of Missouri, wherein said Alexander W. Brinkerhoff is complainant and Albert S. Aloe is defendant. The adverse party was duly notified thereof, as will appear by said notice and the acknowledgment thereon of receipt of copy thereof, and was present in person. The complainant was represented by J. C. Smith, Esq., of Washington, D. C. I further certify that I am not of counsel or attorney to either of the parties to said suit, nor am I interested in the event of said cause.

Attest: DARIUS BAKER,
[SEAL.] *Notary Public.*

Fee, $8.00.

Interrogatory 1. Please give your name, age, residence, and occupation.

Answer. Abiram Francis Squire; forty-two years of age; Newport, R. I.; physician.

61 Int. 2. Please state whether or not you are the inventor of a rectal speculum known to the trade and profession as Squire's rectal speculum.

Ans. I am.

Int. 3. Please give a brief description of the construction of that speculum.

Ans. It consists of a straight metal tube with a flange or flare at the outer end, a slot extending about two-thirds of the distance from the inner end to the outer end. In use the calibre of the tube and the aperture of the slot are filled by a plug of wood, held in position by a spring. That is essentially a description of the thing.

Int. 4. State if you know of any other rectal speculum known to the trade or profession as Squire's rectal speculum.

Ans. If the plug is considered to form an essential part of the speculum, I do. Squire's rectal speculum is now made by Codman & Shurtleff at least with a plug consisting of two parts of wood, which entirely fill the calibre of the tube and the aperture of the slot, and are not held in place by any spring.

Int. 5. Whose invention was the last-named speculum?

Ans. The plug in the last-named speculum was suggested by Dr. Walter Mott, of Boston, although that is an old invention, old as the hills. I have seen it in other specula.

Int. 6. State whether or not Dr. Mott made the suggestion referred to in your last answer for the purpose of improving upon your speculum, which you first described.

(Objected to as incompetent.)

62 Ans. Inasmuch as the plug is an essential part of the speculum, it was for the purpose of an improvement.

(Answer objected; was incompetent.)

Int. 7. State when you invented the speculum known to the trade and profession as Squire's speculum.

Ans. Well, about 1877; at least I have a bill from Codman & Shurtleff for making a speculum of that kind, and is dated the latter part of 1877.

Int. 8. State whether or not the speculum you invented in 1877 had a vertical wall at the inner end.

Ans. It did not; there was no wall at all. The tube was open at both ends.

Int. 9. When were those specula first manufactured with an inclined wall at the inner end?

Ans. I don't know.

Int. 10. When did you first see them manufactured in that manner?

Ans. I should think certainly within two years after mine was on sale. I am not sure.

Int. 11. Do you remember where you first saw them?

Ans. Yes; at Codman & Shurtleff's, in Boston.

Int. 12. State whether or not in your practice you have had extensive use for the instrument you have described.

Ans. No; I use it very seldom.

Int. 13. Are you familiar with the surgical instrument known as catheter?

63 Ans. Yes.

Int. 14. If an expert were to state that a rectal speculum and a catheter were mechanical and professional equivalents, what value would you attach to his opinion?

(Objected to as incompetent.)

Ans. I should not have any opinion of him as an expert on that statement.

(Objected to as incompetent.)

Int. 15. Would you agree or disagree with him?

(Objected to as incompetent.)

Ans. I should agree in part and disagree in part.

Int. 16. In what part would you disagree with him?

Ans. I should disagree in so far as that a catheter is used chiefly for the removal of the contents of an organ, mainly the bladder, whereas a rectal speculum is hardly ever used for the removal of the contents of the rectum.

Cross-examination:

Cross-int. 1. Dr. Squires, are you a graduate from a regular medical school?

Ans. Yes.

X Int. 2. Are you a member of any regular medical society of the United States, or have you been?

Ans. I have been; am not now.

X Int. 3. Dr. Squire, you stated in your direct examination that you invented a speculum, known as the Squire speculum, in
64 1877, and had the same made by a surgical instrument house known as Codman & Shurtleff, of Boston. If you were to see a drawing copied from their book as they had it at that time, would you recognize it?

Ans. I believe I could. I refer to the drawing of my speculum as I invented it.

X Int. 4. You stated from the best of your knowledge or belief that a Dr. Mott, of Boston, suggested an improvement or modified your speculum by having the plug altered so as to be in two pieces and dispensing with the spring. You do not know the exact date, do you?

Ans. I am quite positive it was within a year.

X Int. 5. This drawing handed to you, which will be marked "Exhibit 20," what do you know about that speculum?

65 & 66 (Drawing handed to witness, which I mark "Exhibit 20," Darius Baker, notary public.)

(Here follows diagram marked p. 65.)

67 Ans. Nothing.

X Int. 6. I understood from Codman & Shurtleff that Dr. Squire is the inventor of the speculum, "Exhibit 20," in the year 1877, and improved on by Dr. Mott September, 1878. You say, Doctor, that you know nothing of that drawing?

(Objected to because the question introduces matter that is not in evidence.)

Ans. I know nothing of it as it is.

X Int. 7. Do you know of any other Dr. Squire that invented a speculum about the same time as yours?

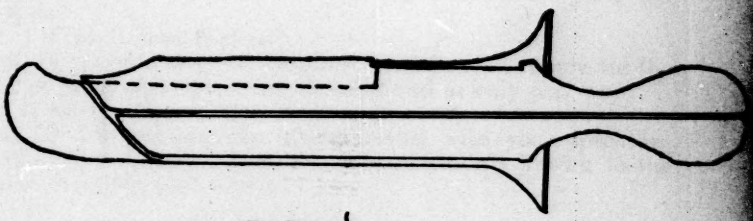
Ans. No.

X Int. 8. How is it that Codman & Shurtleff will swear and can prove by their books that they made a speculum of which "Exhibit 20" is an exact copy of drawing on their books and entered as Dr. Squire's speculum, made for Dr. Mott, of Boston, September, 1878, and you stated in your examination that Dr. Mott suggested the improvement about that time and you know nothing of it according to the drawing?

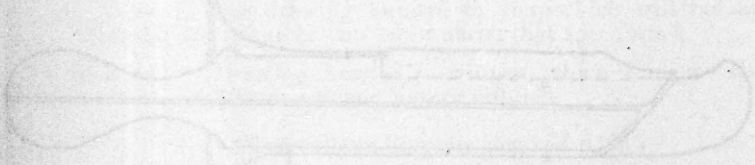
(Same objection as to X Int. 5.)

Ans. I know nothing about who made the improvement in the metal portion of the instrument. I believe that Dr. Mott made the improvement in the plug.

X Int. 9. Did you ever see the speculum made by Codman &



No. 85.
Brinkerhoff &c
Aloe
} p. 65



Shurtleff for Dr. Mott in 1878 and known as Dr. Squire's speculum?

(Objected to because it has not been found that any speculum was made for Dr. Mott.)

68 Ans. I have never seen a speculum as modified by Dr. Mott and called Squire's speculum, except the modification in the plug, as before stated.

X Int. 10. Then, Doctor, you know nothing of a speculum as shown in "Exhibit 20"?

Ans. I have seen that speculum, but I don't know who invented it.

X Int. 11. How long ago?

Ans. I can't tell.

X Int. 12. Can you form any idea?

Ans. I don't think I could place it within five or six years.

X Int. 13. Does the plug or obturator in the speculum which you know as Squire's speculum or "Exhibit 20" answer the place of a metal slide?

Ans. I think it does, perfectly.

X Int. 14. In your original speculum that you first made did the opening or penetration go to the extreme end or only part way?

Ans. It went to the extreme inner end.

X Int. 15. Did you ever use in connection with your speculum for examination a mirror with a handle, commonly known to the profession as a laryngeal mirror?

Ans. No.

X Int. 16. What year did you commence to practice?

Ans. I think in 1867.

ABIRAM FRANCIS SQUIRE.

69 UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

In the United States Circuit Court in and for the Eastern Division of the Eastern District of Missouri.

ALEXANDER W. BRINKERHOFF, Complainant, }
vs.
ALBERT S. ALOE, Defendant. }

Be it remembered that on the 16th, 17th, and 18th days of January, 1888, I, Eleneious Smith, appointed special examiner to take testimony in said cause by order of said court made on the third day of December, 1887, did cause to be and appear before me on said dates, at the office of Augustus Binswanger, Esq., in the Darby building, S. W. corner of 5th and Olive streets, in the city of St. Louis, in said district, John P. Bryson, Augustus C. Bernays, Henry H. Mudd, Herman Spackler, Warren B. Outten, Andrew Leslie, Charles E. Michel, William Grady, Albert S. Aloe, Samuel Knight, and Julius Robertson as witnesses to testify on behalf of the defend-

ant in a controversy now pending and undetermined in said
70 court wherein Alexander W. Brinkerhoff is complainant and Albert S. Aloe defendant, and said witnesses were each by me first duly cautioned and sworn to tell the truth, the whole truth, and nothing but the truth and did severally depose and testify as follows:

JOHN P. BRYSON, of lawful age, being first duly examined, cautioned, and sworn as a witness on behalf of defendant, testified as follows:

Examined by GEORGE H. KNIGHT, Esq.:

1 Int. Give your full name, age, residence, and occupation.

A. John P. Bryson; age, 41; occupation, physician; residence, St. Louis.

2 Int. How long have you been engaged in your present profession?

A. 19 years.

3 Int. State whether you have used an instrument in your profession similar to that shown in Complainant's Exhibit C.

A. How do you mean—similar in every respect, or do you mean in shape and having a tube?

4 Int. I mean the general construction—the tube of the instrument.

A. I have used a tube with an opening in the side of it.

5 Int. What have you used in connection with that?

71 A. I used an ordinary laryngoscopic mirror.

6 Int. How long have you used such a mirror?

A. As far as I can now fix the date, about since 1874. The winter of 1874, as well as I can fix it now. I have a way of fixing it in my mind.

7 Int. If you have no objection, state the way in which you fix it.

A. I had a tooth drawn, and in showing me the condition of the tooth the dentist used a mirror similar to the laryngoscopic mirror to reflect the light, and also to show the back part of the tooth. That suggested to me the use of the mirror in a rectal examination.

8 Int. You are positive this was in 1874?

A. Yes, sir.

9 Int. You state you first used the instrument at that time. Have you used it constantly since that time?

A. I used it for quite awhile. I used it whenever I had occasion to use it. Don't know how often that has been.

10 Int. Where did you secure the instrument?

A. At an instrument store. I don't know. Some instrument store in the city. Either Leslie's, Aloe's, or some of the stores here.

72 11 Int. Look at the instrument I hand you and state whether that is the same instrument you used.

A. Yes, sir; it is excepting that the opening in the side of the

tube was closed in front. It was an oval opening in the side, in other words.

(Instrument is here produced by defendant and marked Exhibit 1 A.)

12 Int. What did you use in connection with the tube?

A. Laryngoscopic mirror.

13 Int. What was the form of it?

A. The mirror was round and set at an angle similar to the one here, except that I myself bent the handle to facilitate the use of the instrument.

(Mirror is here offered in evidence by defendant and marked Exhibit 2 A.)

I believe that I ought to say that the mirror that I used was a little smaller than that; very nearly the same size.

14 Int. Now, state how you used those two parts, Exhibits 1 A and 2 A.

A. In searching for some small lesion or disturbance in the mucous membrane, such as a fissure of the anus, I would oil and insert this instrument, Ex. 1 A, until I came to what I
73 thought was the site of the trouble, and then by warming the mirror so as to prevent its being caught would introduce that and with a head mirror would throw the light upon it. Generally threw the light into the tube with a head mirror on the forehead.

15 Int. Is there any other circumstance you can mention which makes you think it was as early as 1874 you used that instrument?

A. There is no other excepting the date of my marriage. I happened to fix that date in a certain way. By that I know it was the winter subsequent to my marriage—latter part of the winter.

16 Int. Is your practice in the line of the use of these instruments?

A. Yes, sir.

17 Int. And has been since 1874?

A. Yes, sir.

18 Int. As an expert in the use of these instruments, is there or not, in your opinion, an advantage in the use of a slide in the opening Exhibit 1 A?

A. You refer to this Exhibit 1 A?

19 Int. Yes, sir.

A. No, sir.

20 Int. There is no advantage?

74 A. No, sir.

21 Int. Why is this?

A. Well, the slide does not in my experience facilitate the introduction of the instrument at all. If the slide is of metal you don't see anything through it. If it is of glass, the tissues are pressed so tightly that the blood is pressed out and they show very little evidence of congestive disorders. The pressure of the tissues squeezes out the blood.

22 Int. How does the tube without the slide operate differently from this?

A. They fall somewhat into the opening in the tube, and there bring no pressure if there are any special points of congestion you are able to discover them better. Then, besides that, you can see rough spots, erosions where the mucous membrane is stripped off, easily. I have used such an instrument in searcing for fissures of the anus, and they are sometimes small and you must have them exposed well before you can make them out in many cases—quite a number of cases.

23 Int. The use, then, of any instrument without a slide or
75 opening which allows these parts to enter the tube does not disturb them?

A. Yes, sir; I might say in this connection that I ordinarily prefer a Simms vaginal speculum.

Cross-examination by JOHN C. LEE, Esq., for complainant:

1 X Int. Have you made, Doctor, any branch of your profession a specialty?

A. Diseases of the genital-urinary organs and the rectum.

2 X Int. How much of a specialty is the treatment of the rectum with you?

A. It is not so much of a specialty with me as the treatment of the genital and urinary organs. But then I never have occasion to make it so.

3 X Int. Has the treatment of the rectal organs been as much a specialty with you as the genital and urinary organs?

A. I do not think so much time, because I am occupied with the other more. I am constantly treating diseases of the rectum; but don't see as many cases as of the others.

4 X Int. How many cases have you treated during your practice annually of hemorrhoids?

A. I don't know that I can give any figures. I have never
76 kept any statistics in that way. I could only make a supposition that would be a very uncertain matter.

5 X Int. Have you treated a half dozen cases annually on the average?

A. Since when?

6 X Int. Since you entered practice.

A. The cases would vary very much when I entered practice.

7 X Int. I asked on the average?

A. I don't know. I think perhaps I have. I am not certain on that, but that is my belief.

8 X Int. Rectal diseases are of several kinds, are they not?

A. Yes, sir.

9 X Int. The rectal diseases are almost always attended, are they not, with some abnormal growth of the parts?

A. No, sir; they are not always so attended.

10 X Int. I believe if you call hemorrhoids a growth I think they would be?

—. Yes, sir; I think hemorrhoids are the most frequently concurring diseases.

11 X Int. Are there not rectal tumors?

A. Specially of the hemorrhoidal kind.

12 X Int. Are there not special diseases called piles or produced by what is known as piles?

A. You mean general diseases?

13 X Int. General diseases produced by piles in a given
77 case? I re-ask the question in the same language.

A. I don't understand that question.

14 X Int. We will then pass it. What is the object or purpese you have in using the instrument marked Exhibit 1 A in your testimony?

A. I have used that to search for any pathological or abnormal condition that is within its reach.

15 X Int. You use it for the purpose of bringing to your view the diseased part, do you not?

A. Yes, sir; when it is within reach of it.

16 X Int. For the same purpose you use in connection with it the mirror, a sample of which is shown in Exhibit 2 A?

A. Yes, sir; that is, I use the mirror with the intention of illuminating the parts.

17 X Int. The object in illuminating is to enable you to see by your eye, either directly or by reflection, the appearance of the diseased parts?

A. Yes, sir.

18 X Int. And the sole object of both instruments is to diagnose the disease?

A. I sometimes use the other exhibit, 1 A, in treating it.

19 X Int. It sometimes happens, does it not, that you find
78 the diseased part of the rectum as far inward as the upper end of the slot in Exhibit 1 A, don't you?

A. Yes, sir; and sometimes further, too.

20 X Int. And sometimes you find it at other points from the upper end clear down to the shoulder or ring of Exhibit Ex. 1 A?

A. Sometimes you find it near the shoulder or anterior portion.

21 X Int. How much of an intrusion within Ex. 1 A have you discovered sometimes the parts make?

A. I have discovered that there was very little; and then again I have discovered that they filled the whole burner of the tube.

22 X Int. In a case of that kind you could not, of course, use your mirror where the whole tube was filled with the parts.

A. Not unless they were pressed back with another instrument far enough to admit the mirror. Sometimes that can be done and sometimes not, and you cannot use it at all.

23 X Int. In such a case as that where the tube was filled or nearly filled, would you encounter any difficulty in withdrawing the tube?

79 A. Sometimes I have where there was a hemorrhoid that protruded into the tube opening, but I have never encount-

ered any serious difficulty. It can be easily pulled out with other instruments.

24 X Int. Will you define in other and simpler language so that others than members of your profession will understand what is meant in your profession by hemorrhoids?

A. A hemorrhoid is an abnormal enlargement of the blood vessels, more especially the veins that lie immediately beneath the surface of the mucous membrane of the rectum.

25 X Int. For how many inches from the external anus may that hemorrhoidal growth be found in different cases?

A. You mean from the junction of the skin and mucous membrane? I have never seen them higher than 3 and ½ inches myself.

26 X Int. Do you remember whether the learning of your profession locates them farther up the rectum than that?

A. I don't remember the distance, but I think they are sometimes located higher up, and the mere fact that I have never seen
them located higher up does not interfere with my belief that
80 they are found higher up. Most that I have seen have been
dragged down, and the constant dragging has, of course, changed the position of their attachment to the wall of the bowel or rectum.

27 X Int. Will you be kind enough to state in language equally plain what piles are?

A. Piles are also abnormal enlargements of blood vessels of the rectum.

28 X Int. Presenting what appearance in color and size?

A. The size varies greatly, from some that I would call piles not larger than a French pea to others that are quite the size, when filled with blood, especially when they are extended from the bowel, of a hickory nut. Then, of course, when they are inflamed and swollen I have seen them larger.

29 X Int. I speak now of the hardness and flexibility of hemorrhoids and piles.

A. I understand hemorrhoids and piles to mean the same thing. When not extended and strangulated they are, as a rule, very soft and flexible; sometimes attached by a broad base, more frequently
when old by a narrow base. They feel as if they were sacks
81 of blood when they are extended, strangulated; inflamed
they are of greater consistency.

30 X Int. At any time, whether strangulated or not, they are not sufficiently hard to prevent them being crowded down through an opening or slot in Exhibit 1 A?

A. I have never seen an internal pile or hemorrhoid that was not soft enough to go into an opening such as that. But I have seen them where they were extended. I believe they would not go into that; they were too hard to enter into it to a great extent; they would to some extent. I have never used such an instrument on an external pile or pile that was extended or inflamed; there was no occasion to use it.

31 X Int. By an external or extended pile you mean what?

A. By external I mean one that forms outside the junction between the skin of the body and the mucous membrane. By extended pile I mean one that has its attachment to the mucous membrane of the rectum, but has been by force pushed or strained out—pushed outside the circular muscle which closes the rectum of anus below.

82 32 X Int. I suppose, Doctor, you have used several sizes of this same sort of instrument, Exhibit 1 A, smaller?

A. Yes, sir.

33 X Int. Adapting the opening to the size of the orifice to be examined?

A. It is a long time since I used an instrument that had any shape like that at all.

34 X Int. How long since?

A. Five or six years, about.

35 X Int. Is that because you have ceased to practice, measurably, in rectal diseases?

A. No, sir.

36 X Int. Is it because you have found some other appliance better?

A. That answered my purpose better; yes, sir; and not only appliances but the posture of the patient and for manipulative efforts to investigate the rectum.

Redirect examination by Mr. KNIGHT:

1 Int. You were asked on cross-examination what the object of Exhibit 2 A was in connection with Exhibit 1 A; whether it was not for locating the part. I will ask you whether if Exhibit 1 A was withdrawn while the inclined mirror, 2 A, remained in

83 the tube, would it not serve to deflect the parts that had entered the tube out of the tube without injuring them.

A. It would in certain cases, but I have never used them for any such purpose. If I wished to push anything out I would use a probe or depressor, if I wished to accomplish any such thing as that.

JOHN P. BRYSON.

AUGUSTUS C. BERNAYS, being duly examined, cautioned, and sworn as a witness on behalf of defendant, deposes and says as follows:

Examined by GEORGE H. KNIGHT, Esq.:

1 Int. Please give your full name, age, residence, and occupation.

A. My full name is Augustus Charles Bernays; my age is 33; my residence is St. Louis; occupation, surgeon, practice of surgery.

2 Int. How long have you been following your profession in this country?

A. I graduated in 1876; first at the university at Heidelberg, Germany. Since then I have been practicing my profession in this

country—10 years. After I graduated in Heidelberg I spent
84 two years in Berlin, London, and other places studying my specialty—surgery.

3 Int. Whom did you commence practicing under?

A. I never practiced under anybody. I was sent to Heidelberg when I was about 20 years old, or not quite 20 years old, and I began the study of medicine there in 1872 and graduated in 1876. They require four years of continuous study before they admit you to examination. But I was born in America; I am an American.

4 Int. Were you acquainted with Hilton, the author of the publication entitled Hilton's "Rest and Pain"?

A. Yes, sir.

5 Int. Where did you know him?

A. I knew him in London; heard him lecture and saw him operate at Guy's hospital and other hospitals.

6 Int. What lectures have you reference to?

A. He delivered a course of lectures that I don't remember the name of; they were named after some celebrated surgeon—"The Hunterian lectures." I don't remember the name, but they were delivered before the Royal College of Surgeons, England, and, besides that, chemical lectures at the hospitals.

85 7 Int. Are they published?

A. Yes, sir.

8 Int. What in?

A. Those in England by request of his students. Those that heard them thought them so valuable that they should be printed, and they were printed first between 1872 and 1876. I don't remember the exact year, and then Wm. Wood & Co. reprinted it in 1879, and that copy is the one you have in your hand.

(Complainant enters objection to all testimony touching the delivery of these lectures and the publication of them outside of the United States.)

(Defendant here offers in evidence the book referred to by witness in his last answer, which is marked Defendant's Exhibit 3 A.)

(Complainant objects to admission of said book.)

9 Int. Where was this book, Defendant's Exhibit 3 A, published in this country?

A. By Wm. C. Wood and Company, New York, and in London was published by Churchill and Company.

Complainant objects to so much of said answer as relates to the publication abroad.

86 10 Int. Please look at the instrument marked Exhibit C to deposition of plaintiff by Almon Hull, United States circuit court, northern district of Ohio, October 16th, 1886, and on the reverse side Alex. W. Brinkerhoff *vs.* Albert S. Aloe, 2594, equity, United States circuit court, eastern district of Missouri, and state when you first saw such an instrument in this country.

A. I saw this instrument first. I suppose this is a sample of Hilton's speculum. I suppose that is one. I don't know where you got it. I never saw it in this country until I returned, but I saw Hilton use almost the identical speculum before I returned to this country, between 1872 and 1878.

(Complainant enters objection to all that part of the foregoing answer touching what he saw and heard by Hilton outside of the United States in respect to Exhibit C.)

11 Int. State, Doctor, if you will, when you first saw such an instrument in this country.

A. I should say I first saw an instrument of this kind in 1878 in the instrument-makers' stores in this country. The difference between the instrument I saw in the shops and this instrument is very trivial. The flange might be the ⅛ of an inch larger, and the handle of the slide was somewhat shorter than the instrument I now have in my hand.

87

12 Int. Did the slide extend the entire length of the tube in those instruments?

A. That I cannot say. It extended nearly the entire length. This does not extend the entire length.

13 Int. Did that extend as near the entire length as the one you hold, Exhibit C?

A. About as near. I cannot tell; I cannot possibly remember that. If I had had a chance to look up the matter I might have prepared myself. It extended substantially the same length.

14 Int. Did those instruments have an incline similar to Exhibit C on the inside of the tube?

A. Yes, sir; they had that for the purpose of making the fecal matter easy to clean out.

15 Int. What office did that incline serve in withdrawing the instrument after insertion?

A. It must serve the purpose of preventing the mucous membrane from catching and being pinched when cleaned out. The incline, if polished, would also serve as a reflecter. It would serve the threefold purposes as a reflecter and for the purpose of preventing pinching of the membrane, and, thirdly, to make it easily cleaned.

88

16 Int. Do you find an instrument similar to that in Defendant's Exhibit 3 A, Hilton's "Rest and Pain"?

A. There is an engraving on page 171 of Hilton's "Rest and Pain" very similar to the one I hold in my hand.

17 Int. I believe you have already stated that Hilton published an earlier edition of his work?

(Objected to as incompetent and leading.)

A. There was published in 1876 a work, and the preface of that work is reprinted here.

(Answer objected to as incompetent.)

18 Int. Do you know whether or not, as a matter of fact, the cut shown on page 171 of Exhibit 3 A was in the earlier edition you spoke of?

(Objected to as incompetent.)

A. Yes, sir.

(Answer objected to as incompetent.)

19 Int. Did you ever assist Hilton in the use of the instrument on page 171?

A. I saw him use it.

20 Int. Where?

A. In London.

(Both of the two preceeding questions and answers objected to by complainant as incompetent.)

21 Int. Can you state from the fact that you saw Hilton use this instrument illustrated on page 171, Exhibit 3 A, that such
89 cut was shown in his original publication of 1876 and is similar to Complainant's Exhibit C?

(Objected to as incompetent.)

A. Yes, sir.

(Answer objected to as incompetent.)

22 Int. When did you first use an instrument of this character, having a slot in its side and a slide in the slot?

A. I could not tell you that to-day; it is so old. Rectal specula with slides are very old; and if you want to know the year I could not say, but I think they are about twenty years old. I remember seeing one in my father's office in this town as long ago as, I will swear, as 15 years; a rectal speculum with a slide; whether it had this groove in it or not I don't know.

—. ——?

23 Int. Yes; a slide that moved up and down, but whether it had a groove in the edge I do not know.

24 Int. Did the slide extend as near the end of the tube as the slide in Exhibit C?

A. Nearly so. I don't know whether it did so far or not. I cannot be expected to remember that.

25 Int. Were such instruments in general public use as long ago as you mention in this country?

A. I saw it in my father's office, and I suppose they were.

90 26 Int. Where was your father's office?

A. In St. Louis.

27 Int. What was your father's occupation?

A. Practicing medicine; obstetrics.

28 Int. Did you, then, see such instruments in use in this country prior to the time you went to Europe?

A. None but the one my father had. I often cleaned it and handled it.

29 Int. When did you go to Europe?
A. In 1872.
30 Int. When did you first see instruments in this country having an incline similar to the one found in Exhibit C?

(Question objected to as incompetent and as assuming he has seen such incline.)

A. I can't answer the question, anyhow, because I do not remember whether my father's instrument had an incline or not; only I remember the slot in here.
31 Int. Do you know whether they were used in any form of speculums—the inclines?
A. Oh, yes; they were used in all instruments that were liable to get full of urine and fecal matter.

(Question and answer objected to as incompetent.)

32 Int. How early?
A. I don't know; I suppose back in the '50's, '40's, or '30's. Get an old catalogue and you will see that, because it is a simple matter—a simple mechanical device.
91 33 Int. Were they used in connection with a slide?
A. Yes, sir; in catheters.
34 Int. Look at the instrument I hand you and state what it is.
A. That is a urethral speculum, with a slide for a male or female urethra.
35 Int. Has it an incline at the end?
A. It has an incline at the end.
36 Int. When did you first see one of these in this country?
A. I have seen it in old catalogues in this and foreign countries.

(Answer objected to as incompetent.)

37 Int. Can you produce one of the old catalogues?
A. Yes, sir; here is one.

(Catalogue offered in evidence and marked Defendant's Exhibit 4 A.)

38 Int. Whose catalogue is it?
A. Mathieu; published in 1864 in Paris.
39 Int. What page of that catalogue does the illustration of this instrument appear on?
A. Page 46 of Exhibit A 4, Mathieu's catalogue.

(Instrument last referred to is offered in evidence by defendant as Exhibit 5 A.)

40 Int. Now, state when you first saw an instrument like Exhibit 5 A in use in this country.
A. I saw so many of them—my father had a half dozen of them.
41 Int. What year?
A. Well, say between 1870 and 1872; that I would be sure of, as I was often helping my father in his office.

92 42 Int. Were they in general use?

A. I suppose so, from the fact that he had and used a number of them in the urethra.

43 Int. Please state what resemblance there is between Exhibit C and Defendant's Exhibit 5 A, so far as relates to the incline in the end of the tube and slot in the tube and the slide fitting in the slot.

A. If you were to hand me this instrument, Exhibit C, and ask me what I thought it was I would say that it is almost an exact copy of and direct imitation of the Hilton speculum. Plainer I cannot make it. There may be a trivial difference in some respect; but it is so trivial I cannot recognize it now.

(Answer objected to as incompetent.)

44 Int. Now, Doctor, state what difference there is, as far as regards the slot in the tube and slide in the slot and the incline in the end of the tube, between Plaintiff's Exhibit C and Defendant's Exhibit 5 A. I do not refer to the size of the parts or their shape, but to the parts as such.

A. The mechanical principles?

45 Int. Yes, sir.

A. There is no difference in regard to the mechanical principle involved in the slide nor in regard to the incline; but there is a difference, one being conical and the other cylindrical.

93 46 Int. A mere difference in shape?

A. I didn't say a mere difference, but there is a big difference. One is conical and the other cylindrical.

47 Int. Does the fact of one being conical and the other cylindrical affect the slide and the incline?

A. No, sir.

48 Int. What difference, then, is there, if any, in the functions of the parts?

A. There is this difference: one is conical and the other is cylindrical.

49 Int. My question refers entirely to the functions of the incline and the slide.

A. There is none, or only a trivial difference.

50 Int. What knowledge or experience have you, Doctor, in a mechanical way?

A. I have been handling surgical instruments over 10 years. I am probably one of the largest, if not the largest, buyers of those instruments in St. Louis. I mean by that, buyer for my own use.

51 Int. Have you conceived any invention of your own in this line of instruments?

A. Yes, sir.

52 Int. What, if any, is the difference in the function of the incline in the end of Exhibit C when used in connection with the slide? Does it perform its office any differently, assuming that the incline is for the purpose of deflecting the parts that may

94 have entered the tube when inserted as the tube is withdrawn?

A. The incline, when arranged as in Exhibit C, works better

and is an improvement over the incline in Exhibit 5 A. It is a slight improvement—that is, the membrane is not so liable to be caught.

53 Int. Why is that?

A. That is because the slide runs out to the same surface and gives no rise for an angle in which the membrane might be caught with the incline.

53 Int. repeated.

—. The improvement in Exhibit C over the slide and incline of Exhibit 5 A, on carefully re-examining the instrument again, I find to be very slight indeed and due to a little edge on Exhibit 5 A.

54 Int. Now, my question is, Doctor, does the incline in Exhibit C operate the same by itself as it does in connection with the slide or does it operate differently?

(Objected to as leading.)

A. No, sir.

55 Int. Does the slide operate any differently when used in connection with the incline, or would it perform its functions just as well in the absence of the incline?

95 A. Yes, sir.

56 Int. Please look at Defendant's Exhibits 1 A and 2 A and state whether you know of these parts having been used in connection with each other; and, if so, when.

A. This Exhibit 1 A I recognize as an old-fashioned rectal speculum that was in vogue during the war. It is the original rectal speculum without a slot, with a mirror. They were used not only in the rectum, but specially in the vagina. No. 2 is an ordinary reflector, used to examine the vagina, mouth, nose, throat, or any other part of the body. The two were used together long ago. Those two have been used together, I suppose. When it comes to swearing to the exact time I don't remember. Old books tell of the speculum. I believe it is Sir William Ferguson's, who died in 1870. This is the ordinary mirror that is used to examine cavities in the body. The two were used together. This reflector was used for the ordinary milk-glass speculum. This is a black-glass speculum, lined with amalgam.

57 Int. Are you familiar with what is known as the Reed speculum?

A. No, sir; at least I do not know it by that name.

(Model handed witness.)

No, sir; I never saw this instrument before in my life.

96 (The instrument is offered in evidence by defendant and is marked Exhibit 6 A.)

58 Int. Please state when you first saw an instrument of this kind.

A. I don't know when I first saw this. I never considered it worth anything and paid no attention to it; never considered it a valuable instrument and never paid any attention to it.

59 Int. Can you state when you first saw one of this character?
A. No, sir.
60 Int. Can you state whether you saw one before you went to Europe, in 1873?
A. No, sir; I can't.
61 Int. Did you ever see one of these instruments in your father's office?
A. I don't think I did. You see, I can't testify, because I don't know; it is impossible for me to tell.
62 Int. Look at Exhibits 1, 2, 3, 4, 5, and 6, attached to the stipulation, and state what difference there is, if any, between them and Exhibit C regarding the incline.
A. There is this difference, that the incline in Exhibit C differs from the incline in 1, 2, 3, 4, 5, and 6 by being cut off square at the end, whereas the incline at the top of 1, 2, 3, 4, 5, and 6 is rounded.
63 Int. How would this affect the operation of the instruments?
97 A. It would affect them very slightly; but the mucous membrane would be more liable to be caught in Exhibits 1, 2, 3, 4, 5, and 6 than in Exhibit C on withdrawal of the speculum.
64 Int. Is it not a fact that when answering a former question you stated that the mucous membrane would be more liable to be caught in one instrument than in another you were comparing Exhibit C with an instrument similar to Exhibits 1, 2, 3, 4, 5, and 6, than Exhibit 5 A?

(Objected to as leading.)

A. Yes, sir.
65 Int. Does the slide in Exhibits 1, 2, 3, 4, 5, and 6 extend as near to the end of the tube as in Exhibit C?
A. No, sir.

Cross-examination by JOHN C. LEE, Esq.:

1 X Int. Where were you born and when?
A. I was born in the State of Illinois, about 30 miles from St. Louis, in 1854.
2 X Int. When did you remove to St. Louis?
A. When I was an infant I was brought here by my father.
3 X Int. How long have you been acquainted with the defendant, Albert S. Aloe?
A. Personally, I believe, about three years, and with the firm about 10 years.
4 X Int. What firm do you mean?
A. A. S. Aloe and Company.
5 X Int. Who were constituting the company?
98 A. Hernstein a part of the time, until they dissolved partnership.
6 X Int. Where did the firm of A. S. Aloe and Company do business?
A. St. Louis, 4th and Olive.

7 X Int. How long have you known the firm?

A. About ten years.

8 X Int. Have you been dealing with the firm of A. S. Aloe and Company as conducted by Aloe alone?

A. Yes, sir.

9 X Int. For how long a time?

A. Well, at intervals of years I have dealt with them for 10 years; with them and sometimes with other firms.

10 X Int. How long have you known Mr. Aloe personally?

A. Somewhere about three years.

11 X Int. How comes it that your acquaintance with him has been so short and your acquaintance with the firm so long?

A. Because Mr. Aloe does not attend to the surgical department, but has another man who attends to that branch.

12 X Int. You have been buying surgical instruments since your return from abroad?

A. Yes, sir.

13 X Int. In what year?

A. 1878, January.

14 X Int. Just ten years ago?

A. Yes, sir.

15 X Int. Have you made surgery your exclusive branch?

A. Yes, sir.

99 16 X Int. Have you any specialty in surgery?

A. No, sir; unless it is deseases of women and genital, urinary, and rectal deseases and deseases of women. I have been confined to the lower end pretty much.

17 X Int. Are you in any way related to Mr. Aloe?

A. No, sir; in no way.

18 X Int. Neither in business nor otherwise?

A. No, sir. Never have been in his house.

19 X Int. How long since your attention was directed to these implements about which you have been to-day testifying?

A. To which instruments?

20 X Int. The instruments about which you have been to-day testifying.

A. My attention was first drawn to the instrument marked Exhibit C.

21 X Int. When?

A. When abroad.

22 X Int. By Aloe?

A. No, sir.

23 X Int. By his counsel?

A. No, sir.

24 X Int. My question is when either he or his counsel called your attention to these instruments.

A. I never saw his counsel in my life about this matter; and he (Aloe) had a conversation with me about three weeks ago.

25 X Int. Then until within the last three weeks your attention has not been specially called either by Aloe or his counsel to

100 these instruments about which you have been to-day testifying?

A. No, sir; not specially.

26 X Int. When did Mr. Aloe or his counsel call your attention to them at all, if before the last three weeks?

A. Never called my attention to them at all before the last three weeks. I don't think they did.

27 X Int. When did you first see the book Hilton's "Rest and Pain," in evidence to-day as Exhibit 3 A?

A. I saw that in 1876.

28 X Int. When and where first?

A. In London. I had to have it because I had to prepare for the examination.

(Latter part of answer objected to by complainant as not responsive to the question.)

Either in the latter part of 1876 or in 1877; the months following thereafter in 1877.

29 X Int. You know that the book of which you are speaking is a book published in New York by Wood and Company?

A. I know it is a copy of the book of which I am speaking.

30 X Int. You know that the book was published in New York by Wood and Company?

A. The book of which I am speaking was published in London.

31 X Int. Then you didn't see in 1876 the book that was shown you to-day, of which you have testified, but the book you saw
101 in 1876 was an English publication, and the book you see to-day was not the book you saw then?

A. It is a copy of it, because I have seen the old book and read the new and compared them and know they are identical. I know they are identical, so far as such knowledge is possible for ordinary memory of a human being.

32 X Int. As a matter of fact, then, when you have been testifying about this book of Hilton's to-day, you have been testifying about the English edition you first saw?

A. I consider them identical, and consequently I have been testifying about Hilton's book, whether printed in Madras, India, or London. Hilton only wrote one book of that kind.

33 X Int. You say you attended the lectures that appear in this book? Not in this country?

A. No, sir. I heard him deliver those lectures either in December, 1876, or early part of 1877.

34 X Int. You never heard Hilton lecture in America, did you?

A. Never.

35 X Int. You never saw him perform any clinical operations in America, did you?

A. Never.

36 X Int. You never assisted him or was present when he performed any clinical operations in America?

A. Never.

102 37 X Int. Can you state whether figure 55 on page 171 of Hilton's Rest and Pain, Exhibit 3 A, has or has not in it an incline at the upper or inner end of the tube?

A. I can't from the engraving.

38 X Int. Can you state whether in that book there is any description of that engraving? If so, where?

A. I don't find any description of the instrument in the book.

39 X Int. Can you tell from this engraving how deep the tube or perforation in the instrument extends—whether beyond the slide or not?

A. From the engraving I cannot tell that.

40 X Int. Can you tell from the engraving whether the width of the slot in the tube is substantially the same from end to end of the tube and instrument?

A. I can tell that it is nearly the same.

41 X Int. Can you from this diagram tell whether there is a bar connecting the two lips of the slot near or at the heel of the instrument and under the slide?

A. I can tell that there is not from the engraving.

42 X Int. And that you tell simply by inspection with the eye?

A. Yes, sir; from the engravings. Looking at the two pictures together, it is plain, the one on that side and the other on the next page.

103 43 X Int. In making the last answer you assume that the diagram on page 172 is a part or another view of the same instrument as appears on 171, do you not?

A. Yes; I see that.

44 X Int. That is assumed by you that it is a new view of the same instrument?

A. Yes, sir; and the assumption is warranted by the description under the engraving.

45 X Int. And only warranted by that?

A. That is all.

46 X Int. Is there any description there excepting the fine print immediately under the diagram?

A. I have not looked it through carefully, and cannot tell whether there is or not. In the text he refers to figure 56.

47 X Int. On what page?

A. I have marked it.

48 X Int. You find two references which you have pencil-marked, on pages 172 and 173—that is, on the notes immediately under the two diagrams 55 and 56 constitute the basis of your judgement that they are parts of the same instrument?

A. Yes, sir; and also the statement in which he says speculum used by Hilton in Guy's hospital and named after him.

49 X Int. Where is Guy's hospital.

A. In the city of London, England; the city proper.

104 50 X Int. The American edition of Hilton's "Rest and Pain," by Wood and Company, you did not see until either in or after 1879, did you?

A. No, sir; I subscribed for it in 1879.

51 X Int. It came out in 1879?

A. I don't believe it came out until 1880, but I subscribed for it in 1879.

52 X Int. As a surgeon, in a case of rectal desease your first office and work is to discover and diagnose the character or type and whereabouts of the desease, is it not?

A. Yes, sir.

53 X Int. To that end the instrument that best enables you to perform that work is the best instrument for that purpose, is it not?

A. Yes, sir.

54 X Int. After you have discovered and diagnosed the desease and its location, your next work as a surgeon is to apply a remedy so far as your profession can do it?

A. Yes, sir.

55 X Int. The character of rectal deseases, their nature, is divisable into what class or classes?

A. Of rectal deseases?

56 X Int. Yes, sir.

A. They are too numerous to mention, but I will go ahead. In the first place, catarrh of the rectum.

105 57 X Int. In a general way what is the nature of catarrh of the rectum?

A. It is a hypersecretion of the mucous from the membrane, similar to that from the nasal membrane. This may be of specific origin or may be an ordinary catarrh. Then we have besides that a number of general diseases which affect the rectum. Principal are tuberculosis and syphilis. Besides those we have local diseases, and they are most frequent. First, piles. Piles is a condition of enlargement of the veins surrounding the rectum. These piles may be inner piles, located within the sphincter. Internal and external piles—the quacks call some itching and bleeding piles, but there are only two kinds—external and internal piles. The others are only symptoms, which may be attached to both varieties. Then we have ulcerations of the rectum. Ulcerations of the rectum, in the first place, are due to either tuberculosis or syphilis. There is no such thing as a benign ulcer of the rectum except it be due to injury. Besides that we have a series of diseases called fistula. Then we have a very painful and troublesome disease called fissure of the anus. Then we have a series of diseases which come under the head of polypi. These are, in plain English, benign warts.

106 Besides that we have a series of tumors in the rectum, either malignant or benign. Of the malignant there are cancer and sarcoma. Then we have growths such as fatty tumors, glandular tumors, addenoma, and some rare forms of tumor, such as terratoma.

58 X Int. Any other general kinds of rectal troubles you have not mentioned?

A. As a result of these diseases we have prolapse of the rectum and incontinence.

59 X Int. One of the common consequences or effects of rectal diseases is to either enlarge the parts of the rectum, guts of the rec-

tum, causing relaxation and abnormal growths, is it not, and hence in treating rectal diseases you surgeons encounter difficulty from the intrusion of such enlargement and flexibility and unnatural growth into whatever instrument you use to diagnose the difficulty?

A. Yes, sir; they have a tendency to fall into the slot.

60 X Int. Just whereabouts you will find the tendency to fall in, whether near the orifice or one or more inches up it, you can't tell until you make examination?

A. No, sir.

61 X Int. After you have made an examination or diagnosis you then frequently need the aid of mechanical implements to
107 apply your treatment, do you not?

A. Yes, sir.

62 X Int. There has been in later years a cessation largely, has there not, of the use of the knife in the treatment of such diseases?

A. No, sir.

63 X Int. I wish to ask this question, whether the surgical profession resorts as often in later years to the use of the knife in treating rectal diseases as in the earlier years of the surgical profession.

A. I must answer that question by saying that they resort more frequently to the knife to-day than they did ten or twenty years ago, and much oftener than fifty years ago.

64 X Int. Why is that done?

A. Because nowadays since about ten years we have a method of treating wounds called the antiseptic method, which prevents the poisining of wounds, and since then the use of the knife has become more popular.

65 X Int. Are you able to apply the knife to such diseases of the rectum as you don't succeed either in withdrawing from or that naturally extrude from the orifice?

A. Only by the aid of the speculum.

66 X Int. Is it a common thing to resort to the use of the knife within the rectum?

108 A. Not very common. No; lots of doctors never do.

67 X Int. If you can reach with your diagnosis and with the application of your medicine all parts of the rectum is it desirable to use the knife?

(Objected to as incompetent.)

A. That is very hard to answer. Where you can use the knife the treatment is the most radical and safe we know of in rectal diseases.

68 X Int. Do you use the knife for removing unnatural or fungous growths?

A. Yes, sir; we do in fissures. They used to burn it; we now use the knife.

69 X Int. There is no removal of any part?

A. Not in that oporation. There is simply an incision through the base of the fissure.

70 X Int. Is the knife used to remove any part of the natural integument of the rectum?

A. No, sir; only when diseased to cut off prolapsed piles or prolapsed rectum or polypi.

71 X Int. Recurring to Exhibit 5 A, is not the orifice of that instrument simply to withdraw the urine?

A. No, sir.

72 X Int. What other office can it perform?

A. It enables you to wash out. It was made to put in the urethra and run a stream of medicine through it and let it pass off
109 the other side. You see that it is divided into two tubes, the one for the afflux of the water and the other for the reflux.

73 X Int. The offices it performs are the injection of fluid and the other its withdrawal?

A. Yes, sir; or the application, by means of a probe through this hole, of caustic or other medicine.

74 X Int. The organ through which that implement is introduced is what?

A. The urethra of the male or female.

75 X Int. And the urethra is the urinary tube?

A. Connecting the bladder with the penis.

76 X Int. It is not possible with that to make any ocular observation of the difficulty?

A. No, sir.

77 X Int. As there is with a rectal speculum?

A. No, sir.

78 X Int. Does the use of the incline in that instrument have its foundation in any necessity of the structure of the urethra?

A. Yes, sir; it prevents, in pulling it out, the catching of the urethral membrane; but its principal object is to make it easy to clean. It prevents the catching of the mucous membrane.

79 X Int. Is there any liability to catch the mucous membrane in the urethra?

A. Yes; and it is very painful.

80 X Int. It is best to shut it up?

A. Yes; and there will be no danger of catching.

110 81 X Int. That, you say, is an old instrument in surgery?

A. Yes; it is old.

82 X Int. You regard it, do you not, as exceeding desirable in the diagnosis of a rectal trouble to be able to throw light into the rectum to see the character and extent of the matter intruded into the speculum?

A. Yes, sir.

83 X Int. If an old tube like that marked Exhibit 1 A be used there is a liability, is there not, that the parts of the rectum drop into the slot and either to a greater or less extent obscures the view of the operator or surgeon, so that he may not get clear to the end of the tube a satisfactory view of it?

A. That is the reason they invented the slide.

84 X Int. With the slide equalling the full depth of the tube in the instrument so seen, as the slide is withdrawn the least bit the operator can gain his diagnosis of the condition of the rectum in the upper end?

A. Yes, sir.

85 X Int. And as the slide is withdrawn he can continue his observation down to the outer end or mouth of the tube?

A. Yes, sir.

86 X Int. Without the slide the examination would be in many cases impracticable?

111 A. Yes, sir. It would not be so satisfactory.

87 X Int. And hence it is you regard the slide as performing an important office in the diagnosis at least of rectal diseases?

A. It is important in both the diagnosis and treatment of rectal troubles.

88 X Int. You also regard the incline at the inner end of the tube as performing a useful office?

A. I do.

89 X Int. Will you enumerate the offices of a useful kind that the incline performs?

A. Threefold. In the first place, it makes the instrument easy to clean; it prevents the pinching of the membrane and facilitates the extraction of the speculum.

90 X Int. In two ways, or rather for two purposes, does it not, with less pain to the patient and with less liability to ulceration or injury of the parts?

A. Yes, sir.

91 X Int. Doctor, if a speculum of the general character of Exhibit C be made a little longer than the length of the tube within it, if the slide be fully equal to the length of the tube, what difference, if any, is there in the usefulness of the instrument by reason of the additional length?

112 A. The instruments, Exhibits Nos. 1, 2, 3, 4, 5, and 6 of the stipulation, have a great advantage over Exhibit C, in that in front of the incline there is from about 14 lines to an inch of a solid plug which has a tendency to prevent the downward movement of fecal matter, as well as the pinching of the mucous membrane. That is due solely to that solid piece on the end.

92 X Int. But the slide, the slot, and the incline in Exhibits 1, 2, 3, 4, 5, and 6 of the stipulation perform exactly the same office that they do in Exhibit C of the complainant, do they not?

(Objected to as incompetent, irrelevant, and as new matter.)

A. They answer the same purpose with this difference, that the specula of the stipulation are cylindrical in shape, whereas the speculum Exhibit C is conical.

DR. A. C. BERNAYS,
903 *Olive St., St. Louis, Mo.*

113 On the 16th day of January, 1888, not being able to complete the taking of testimony, I adjourned the further taking of the same to the 17th day of January, 1888, at 9 o'clock a. m.

ELEUCIOUS SMITH, *Examiner.*

On the 17th day of January, 1888, I resumed the taking of testimony in said cause as follows:

HENRY H. MUDD, being duly cautioned, examined, and sworn as a witness on behalf of the defendant, testified as follows:

Examined by GEORGE H. KNIGHT, Esq.:

1 Int. Please give us your full name, age, residence, and occupation.

A. 43; physician and surgeon; residence, St. Louis.

2 Int. How long have you been engaged in the profession?

A. Since 1866.

3 Int. Where?

A. In St. Louis since 1869.

4 Int. Have you in practicing your profession used what is known as a rectal speculum?

A. Yes, sir.

5 Int. What form?

A. Various forms.

114 6 Int. Please mention a few.

A. Simms'; the bivalve and a fenestrated one; also a round speculum with an opening in the end—a cylindrical speculum.

7 Int. Will you please describe the construction of these different specula and when you first used them?

A. I have used the Simms for 20 years; it is the same as the vaginal.

8 Int. Describe the last.

A. That is the duck-billed speculum, curved points, concave on one side, convex on the other; simply to hold one portion of the wall of the rectum. The bivalve has two blades, approximately, which can be separated by a hinge so as to expose the wall of the rectum on opposite sides. The fenestrated speculum is one with an opening on the side. The cylindrical is one with an opening at the end, usually oblique. The different forms of the fenestrated that I have used, the first was conical in shape, a truncated cone with an opening full length on one side, narrower at the point than at the base.

Near the opening in this speculum at the end was a polished
115 surface, set obliquely to the axis of the speculum, which served as a mirror.

(Complainant desires to give notice that he shall avail himself of the rule of law relating to testimony concerning devices that are not produced.)

And as a protector to the mucous wall in withdrawing the speculum (witness examines instrument handed to him), a polished surface placed as in this instrument. There was also in that speculum a mirror which was placed along the wall of the speculum opposite the opening in the side.

(Instrument which witness has first examined offered in evidence by defendant, marked Exhibit 7 A.)

9 Int. How long did you use such an instrument as this just introduced?

A. I think about twelve or thirteen years I have had that instrument.

10 Int. Has it been in general use that time?

A. I bought it in an instrument store at that time; it was on sale.

11 Int. When did you first use the bivalve?

116 A. About ten years ago; 8 or 10 years ago. Both of those instruments had been in use longer than I had used them.

12 Int. State whether you have ever used a slide in the opening of the speculum, Exhibit 7 A.

A. Not used a slide in that form.

13 Int. What form have you used the slide in?

A. Used it in an old form of French instrument, in which the speculum was introduced closed, and opened and one blade removed. Such an instrument has been in the college museum for 20 years or more; 25, perhaps.

14 Int. In this country?

A. Yes, sir.

15 Int. Did you ever use an incline in a speculum? Other than a rectal speculum?

A. Yes, sir; used in an endoscope for the bladder.

16 Int. Since when?

A. I have used it commonly for the last five years. I used it in a French instrument perhaps twelve years ago.

17 Int. In this country?

A. Yes, sir.

18 Int. How was it constructed?

A. The old instrument?

117 19 Int. Yes, sir.

A. As I remember, it had a glass; a cylindrical instrument, oval point, with an opening covered with glass, and under that a mirror set on the incline as this (referring to Exhibit 7 A). The mirror there was a glass mirror, not a polished surface.

20 Int. Could that glass be removed in that instrument?

A. I think not; I think it was fixed.

21 Int. What was the object of the glass?

A. To keep the secretions of the urine out of the speculum; keep discharges out of the speculum.

22 Int. How early do you know of slides being used in the speculum?

A. The earliest was in this instrument that I speak of where one section was removed after introduction of the instrument; that is an old instrument; perhaps 25 years old.

23 Int. Did the slide close a slot in the tube?

A. The tube complete was made by perhaps 4 or 5 sections; one of these when opened was thrown aside so as to leave that portion open (referring to Plaintiff's Exhibit C).

24 Int. Was the portion that you speak of being removed

118 in this old instrument similar to the slide in Plaintiff's Exhibit C?

(Objected to as leading.)

So far as it made up the complete tube when inserted in the slot?

A. It answered the same purpose; that is, it completed the section.

25 Int. Could that slide in the old instrument be gradually withdrawn after the instrument was inserted—the tube inserted?

(Objected to as leading.)

A. The entire section was removable.

(Answer also objected to as incompetent and because the question is leading.)

26 Int. Did or did not that removable section extend the entire length of the tube?

A. Yes, sir; extended the length of the tube.

27 Int. Did the tube have an incline at its inner end?

(Objected to.)

A. I think not.

(Answer also objected to.)

28 Int. Where were such instruments first used to your knowledge in this country?

A. The first of that kind that I saw was in a collection of Doctor Pope; perhaps I examined it in 1867 or 1868.

119 29 Int. Is Dr. Pope living?

A. No, sir.

30 Int. When did he die?

A. In 1871; perhaps somewhere near that time.

31 Int. Where did he practice?

A. Here, in St. Louis; went to Europe; lectured here last in 1866; returned here in 1870 or 1868 for a visit.

32 Int. Was he a professor in the college?

A. Yes, sir; of surgery in the St. Louis medical college.

33 Int. You say, then, that you have used a speculum with an incline at the inner end of the tube and a slide in the slot?

(Objected to as leading.)

A. I have used a speculum with a removable section, and have also used a speculum with an incline.

34 Int. I will now ask you as an expert in the practice of your profession whether the incline, in your opinion, acts the same when used in connection with the slide or does it act differently to produce a result.

A. It acts the same.

35 Int. Does it perform a function when used in connection with the slide that it does not perform when used by itself?

120 A. I think not. It would perhaps perform a little better the functions of a reflector when used with a slide, because it does not become soiled so readily; practically the same purpose.

36 Int. As a deflector to throw up the mucous that may have en-

tered the tube when the tube is withdrawn, does it act differently when used in connection with the slide?

A. No, sir.

37 Int. Does the slide perform any function when used in connection with the incline that it does not when used by itself?

(Objected to as leading.)

A. I should think not.

(Answer objected to for same reason.)

38 Int. State what result, if any, the slide produces when used in connection with the incline that it does not produce when used by itself.

A. The slide does not have any greater function in the one case than in the other.

39 Int. State what different result, if any, there is produced by the union of the two parts, the incline and the slide, that is not produced by these parts when used separately.

A. The slide makes the instrument more easy to introduce, and the incline prevents the mucous membrane from being caught in the end of the tube on its withdrawal and gives a better reflecting surface than would be without. The two combined would give the two advantages.

40 Int. How do they operate differently, so far as their respective functions are concerned, when used in connection with each other?

121 A. They don't, so far as I can see.

41 Int. Are you familiar with the publication entitled Hilton's "Rest and Pain"?

A. I have read portions of it.

42 Int. Is it or not a well-known publication?

A. Yes, sir; it is well known.

43 Int. How many editions have been published, if you know?

A. Two at least. I don't know how many—two American editions. There have been more than that, probably.

44 Int. Do you know when the first edition was published?

A. Some time in the '70's; don't know just the time.

45 Int. Do you know, as a matter of fact, whether the American edition is a reprint of the English edition?

A. I think it is.

(Question and answer objected to as leading.)

46 Int. Look at the instrument I hand you, and state what it is.

A. It is an endoscope; modification of Bigelow's evacuating tube.

47 Int. Did you ever use such an instrument?

A. Yes, sir.

48 Int. When and how long?

A. I have used it, the evacuating tube of this form, perhaps five years.

49 Int. How long have you used any form of that kind of instrument?

122 A. I have used those since 1878 or 1877. The old evacuating tube for lithotrity has been in use for more than twenty years.

(Answer objected to as incompetent.)

(The instrument last mentioned is offered in evidence by the defendant and marked Exhibit 8 A.)

50 Int. What difference is there, if any, between this old form of instrument, which you say was used 15 or 20 years ago, and Exhibit 8 A?

A. There is a little difference in the opening in the end of the tube and shape and a difference in the size of the tube.

51 Int. A mere difference of degree?

A. Yes, sir.

52 Int. Did the old form of instrument have the incline found in Exhibit 8 A?

A. Practically the same.

53 Int. What was the object of the incline in the old instrument?

A. To avoid catching the mucous membrane on the withdrawal of the instrument.

Cross-examination by J. C. SMITH, Esq.:

1 X Int. In your profession have you or not made the treatment of rectal diseases a specialty?

A. No, sir.

2 X Int. Have you had any experience with rectal diseases?

A. Yes, sir.

123 3 X Int. How many cases per annum of that character have you treated?

A. I don't know.

4 X Int. Please give us an approximation.

A. I can't do it.

5 X Int. Have you treated 5 cases annually?

A. Yes, sir.

6 X Int. 10?

A. Yes, sir.

7 X Int. 20?

A. Yes, sir.

8 X Int. 50?

A. Yes, sir.

9 X Int. Every year?

A. Perhaps not during the first few years of work.

10 X Int. Have you treated more than 50?

A. In some years I think I have.

11 X Int. Some years you think you have?

A. Yes, sir.

12 X Int. Will the average of your practice exceed 50 cases of that character a year or less, in your judgement?

A. I don't know that it will.

13 X Int. In your practice do you ever use this instrument marked Exhibit 8 A in rectal treatment?

A. No, sir; I have never used it for rectal treatment.

14 X Int. Is it adapted to the treatment of diagnosis of rectal troubles?

A. A larger form would be, I think, very well.

15 X Int. Did you ever see one of this character by which you could diagnose rectal difficulties?

124 A. Yes; with an obturator put into it during its introduction.

16 X Int. What is an obturator?

A. Plug.

16½ X Int. Please explain how you would use that instrument and how it would appear with the obturator in.

A. A plug put in to fit in the opening. (Witness illustrates by showing obturator in exhibit here offered in evidence by defendant and marked 9 A.)

17 X Int. Did you ever use for diagnosing rectal difficulties the instrument marked Exhibit 8 A enlarged with a plug in it?

A. Not the exact instrument marked 8 A.

18 X Int. Enlarged, I say.

A. No, sir.

19 X Int. Then as a matter of fact that instrument you have called an endoscope and which is marked as Exhibit 8 A is not adapted to diagnosing or treating rectal difficulties?

A. Not in its present size; no, sir. I believe I have used it for that same thing in sensitive parts where only a small portion was to be exposed.

20 X Int. But it is not adapted to general use for the purpose to which I refer?

A. I think not.

21 X Int. You mentioned a sectional speculum that you had handled. Be kind enough to describe that divice as well as you can.

125 A. If I remember rightly it was made of 5 plates, equal in size, hinged to each other so that when it opened it made a complete cylinder. One section was dropped out in order to leave an opening on one side; could be dropped out.

22 X Int. How was that section dropped out?

A. By a hinge.

23 X Int. By removing it from its hinges?

A. No, sir; by dropping it inside the chamber.

24 X Int. Then it was hinged so that one of the sections would drop inwards instead of out; would the others drop out?

A. No, sir; they could be held.

25 X Int. At the extreme point of that instrument there was a mirror arranged, was there not?

A. I don't remember that there was. I think not.

26 X Int. When did you first see a speculum adapted to rectal treatment with a slide over the slot?

A. A slide over the slot?

27 X Int. Yes, sir; and also an inclined inner wall at the point.

A. I should think within the last ten years—perhaps ten years ago—within that time, certainly.

28 X Int. Where did you first see that instrument?

A. At some of the instrument stores in the city here.

29 X Int. Can you give us with any accuracy the date and place where you first saw that instrument?

A. No; the first instrument of the kind I used was—the first instrument combining those points that I remember distinctly to have seen was one I used on a physician who
126 obtained it, I think, of Brinkerhoff.

30 X Int. That was the first instrument you ever saw that had these several parts I have mentioned in it combined?

A. That was the first I remember distinctly to have seen.

31 X Int. Tell us the name of that physician.

A. No, sir. I will not; it is a private matter.

32 X Int. But you understood at the time that was one of Brinkerhoff's instruments—the plaintiff in this case?

A. I don't know anything about the plaintiff.

33 X Int. What has become of this old instrument you speak of that you used many years ago with a mirror arranged on an accute angle on the point?

A. I think I have it in my possession, sir.

34 X Int. Will you produce it?

A. I can and will.

Redirect examination by GEO. H. KNIGHT, Esq.:

1 Int. How often did you use this instrument that you term a Brinkerhoff's instrument?

A. Perhaps a dozen times.

2 Int. What did you think of that instrument as compared with others?

A. I didn't see any special advantage in it. I think Simms' speculum the best of the lot.

3 Int. There is no advantage, then, in your opinion, in
127 using the incline and slide in combination?

(Objected to as leading.)

A. No, sir.

(Same objection to answer.)

4 Int. You say the first time you used the incline and slide combined was on a physician, and that instrument was what is known as a Brinkerhoff's instrument. You intimated, however, on cross-examination, that you had seen these two parts combined in an instrument before.

A. Yes, sir.

5 Int. How long before?

A. I don't know about that. Certainly within the last eight or ten years.

6 Int. Do you think it was as much as 9 years ago?

(Objected to as leading.)

A. I should think somewhere near that time.

(Same objection to answer.)

(Defendant here offers in evidence Simms' vaginal speculum, which is marked Exhibit 10 A.)

Recross-examination by J. C. SMITH, Esq.:

1 X Int. Doctor, does the instrument marked Exhibit 10 A, Simms' vaginal speculum—is that the same instrument to which you have recently referred in your testimony as Simms' vaginal speculum?

128 A. It is not the original shape of Simms' speculum. A little difference in the curve and character of the blade. The principle is the same.

HENRY H. MUDD.

HERMAN SPACKLER, of lawful age, being duly cautioned, sworn, and examined as a witness on behalf of the defendant, testified as follows:

Examined by GEORGE H. KNIGHT, Esq.:

1 Int. Give us your name, age, and occupation.

A. Herman Spackler; age, 56; occupation, instrument-maker; residence, St. Louis.

2 Int. What kind of instruments are you engaged in making?

A. Surgical instruments.

3 Int. How long have you been engaged in this business?

A. Since 1853.

4 Int. In what country?

A. This whole time in the United States. Up to 1857, in Baltimore, Maryland, and since then in St. Louis, with slight interruption during the war.

5 Int. Are you familiar with what is known as rectal specula?

A. Yes, sir.

129 6 Int. And vaginal speculums?

A. Yes, sir.

7 Int. Please describe the construction of some of these instruments.

A. The oldest speculums—vaginal speculums—were made, some of glass and some of ivory. Afterwards the metal speculums came into use.

8 Int. How were they made; what was the construction?

A. The oldest kind were made mostly cylindrical, and used with an obturator or plug in front.

9 Int. What other forms were made?

A. Well, the next thing I remember was a cylindrical speculum

that was called Segala's speculum. By instrument-makers it goes under the name of trivalve speculum.

10 Int. What other forms?

A. After that they went pell-mell; every surgeon invented speculums.

11 Int. Now describe some of the other forms of speculums.

A. The next thing they went according — Dr. Simms and made a Simms speculum. The first one here we made in 1868 or '67; then after that we had here different doctors who liked to invent speculums and made the so-called Bryant speculum. We
130 called that a self-retaining speculum.

12 Int. How was that made?

A. That was constructed with only one blade, connecting with a lever thrown over the back of the person, connecting around the back with a strap. Then the next thing we made was the so-called Pallen speculum, also a self-retaining, made after the same manner.

13 Int. Go on and mention any others you can.

A. There were others; we saw lots of them. Cylindrical speculums afterwards with a glass light in them; that was the first one I saw after it.

14 Int. What was the name of that speculum?

A. I don't remember that it had any name at that time.

15 Int. How was it made?

A. Similarly made to this.

(Witness refers to instrument here offered in evidence by the defendant and marked Exhibit 11 A.)

16 Int. Go on and describe this.

A. That speculum at that time was brought to me by a doctor. I don't remember any more whether it was old Dr. Hodgen or if it was old Dr. Paul Eave, of Nashville, Tenn. He was at that — operating surgeon in the Missouri college.

17 Int. State here when that was.

131 A. It could not be later than 1876 or 1878.

18 Int. Go on and state how that instrument was made that was brought to you.

A. It was made out of white or soft metal. Some call it pewter, and, as a matter of course, it is called block tin; but it is a composition. That speculum had a handle to it made of the same material; had also a slide, and the slide was made of glass, flat; was about—if I remember right about — the outside diameter was not more than $\frac{3}{4}$ inch; it may — $\frac{5}{8}$; but was about $\frac{3}{4}$ inch, the outside diameter.

19 Int. How did the slide work in connection with the tube?

A. As an ordinary slide does. The groove was in the metal, and the glass slide was beveled on two sides.

20 Int. Was it in this respect like Exhibit 11 A?

A. No. It had two bevels; this has only one. The glass was beveled on two sides.

21 Int. How about the groove?

A. The metal was similar to that—a T groove.

22 Int. Did the slide extend the length of the tube?

A. Yes, sir.

23 Int. Clear to the end?

A. Clear to where the plug which was inserted in front stopped.

24 Int. Like Exhibit A?

132 A. Yes, sir.

25 Int. What was that instrument brought to you for by this doctor?

(Objected to as incompetent.)

A. The reason that he brought it to me—what he wanted done was, in the first place, he complained that the speculum was too rigid to withdraw from the rectum.

(Answer objected to as incompetent.)

Then he also wanted to get more light to see, and asked me to put a mirror in it.

(Also objected to.)

And I made him that speculum—a mirror, a common looking-glass mirror—because we had no others; common reflector, of common looking-glass material. The mirror was set at an angle of 45 degrees, so as to reflect upwards.

26 Int. Which way did it incline, towards the tube or bottom of the speculum?

A. Towards the upper end.

27 Int. How did you fasten the incline in the tube?

A. That bothered me a great deal at that time. There was no other way. I tried first with shellac, but didn't succeed, and spoiled my mirror; then I fastened it with plaster-paris, and that stuck a little.

133 28 Int. You say the doctor brought you this between 1876 and 1878?

A. Yes, sir; about that time.

29 Int. How do you fix the time?

A. Because that time I had my shop on Pine street between 7th and 8th, on the north side.

30 Int. When did you remove from Pine and where to?

A. I moved from Pine street, I believe it was, in 1879, to the corner of 8th and Olive, opposite the post-office building, on the second floor.

31 Int. When this instrument was repaired by you what was the construction of it then?

A. It was a cylindrical instrument—speculum—a straight cylindrical speculum, with a slide in it, tapering end, so as to make the introduction of the instrument easy, and had an inclined mirror.

32 Int. Was it like Defendant's Exhibit 11 A, substantially?

A. Yes, sir; but the end was more pointed; it was not so abrupt. The point was about ½ inch long.

33 Int. Did or did not the tube have a handle?

A. The tube had a flat handle cast out of the same material.

134 34 Int. Did you make any other such instrument at that time?

A. Other instrument?

35 Int. Such instrument as that?

A. That I don't remember. We were always getting up new things. Hardly did anything else but make new instruments.

36 Int. Is Dr. Hodgen now living?

A. No, sir; the old doctor is dead.

37 Int. Was it the old man that brought the instrument to you?

A. Yes, sir; I didn't know the young man at that time.

38 Int. What other form of speculum having a slide in the tube, an incline in the end of the tube, were you familiar with at that time, if any?

A. No; I couldn't say that I was familiar with any used at that time inside the body which had an incline.

39 Int. How about the slide?

A. They had slides. The slide in the old vaginal or Segalla or trivalve had a slide going the whole way of the instrument, and the slide is at the same time a joint, and the instrument is folded together, the two parts come together that way (illustrating), and then the third one falls over, because you get it out of the

135 groove, and it falls over. When the speculum is then introduced then the three parts form a cylinder. If you want to use then the slide there is in the front part of the speculum a catch. If you press that catch down and you can use it for a slide and draw it out so far as you want or draw it entirely out (illustrating).

40 Int. Was there any incline used in connection with this?

A. No, sir; only an obtruator. But they used later what was called a laryng-al mirror with it—the same as shown in Exhibit 2 A.

41 Int. How was this mirror used in connection with the speculum and tube?

A. The speculum was introduced so far as I know—as a matter of course I am not a surgeon, I am an instrumentmaker; I don't use instruments, but still the maker usually has the instrument explained to him, so I get my information from a surgeon, and he generally tells how he wants it used and tells us to make it the best way we can as possible.

(Objected to as incompetent.)

42 Int. Was a mirror inserted into the tube?

136 A. Into the speculum. (Witness here takes Exhibit 2 A and inserts it into Exhibit 12 A, illustrating its use.)

43 Int. When was this speculum illustrated in a catalogue, if ever, to your knowledge?

A. To my knowledge about twenty years ago at least; the Segalla speculum—trivalve—about twenty years ago.

(Foregoing question and answer objected to by complainant as incompetent.)

44 Int. Have you one of those old catalogues?

A. No; I believe not. I left all my tools and everything at Leslie's when I went to Aloe's.

45 Int. Look at figure 3831, on page 726 of Sheperd & Dudley's illustrated catalogue of surgical instruments, and state whether the instrument shown in this figure is the kind you have just been describing.

(Objected to as leading and incompetent.)

A. Yes, sir.

(Answer objected to as incompetent.)

46 Int. When did you see such an instrument illustrated in a catalogue first?

A. At least about twenty years ago. I can't fix the time for certain.

(Question and answer objected to as incompetent.)

137 47 Int. Were such instruments in common use at that time?

(Objected to as incompetent.)

A. Yes, sir.

(Objected to for same reason.)

48 Int. In connection with them the inclined mirror shown in Defendant's Exhibit 2 A?

(Objected to as leading and incompetent.)

A. Yes, sir.

(Same objection to answer.)

(Catalogue of Shepard and Dudley offered in evidence by defendant and marked Exhibit 12 A.)

49 Int. Look at Defendant's Exhibit 8 A, called an endoscope, and state whether you ever saw anything like this before; and, if so, when.

A. Yes, sir; I have seen them and I have made them, too.

50 Int. How long ago?

A. That I can't answer exactly how long ago we have made them. We have made them constantly for the last 8 or 9 years, but it may be that we have made them before that time, but my recollection is about 9 years. We have made these endoscopes the way that is made.

138 51 Int. How did you make them before that?

(Objected to as incompetent.)

A. Made them with a straight tube open in front.

(Answer objected to for same reason.)

52 Int. Did they have an incline also?

A. No, sir; not to my recollection.

53 Int. May they have been made with an incline prior to that time without your knowledge?

(Objected to as incompetent.)

A. That is what I believe they have been—made before.

(Answer also objected to as incompetent.)

(By consent of parties the witness Herman Spackler is here withdrawn for the purpose of examining Dr. Warren B. Outten.)

ELEUEIOUS SMITH,
Special Examiner.

139 WARREN B. OUTTEN, being first duly examined, cautioned, and sworn as a witness on behalf of defendant, deposes and says:

Examined by GEORGE H. KNIGHT, Esq.:

1 Int. Please give us your full name, age, residence, and occupation.

A. Warren B. Outten; 3518 Chestnut street, St. Louis; physician and surgeon.

2 Int. How long have you been practicing your profession?

A. Since 1866.

3 Int. Where?

A. In St. Louis.

4 Int. Are you familiar with what is known as rectal speculums?

A. Yes, sir; moderately well posted.

5 Int. Do you know of such an instrument wherein is combined a tube with a slide extending the length of the tube?

A. I remember to have seen specula of that kind about 23 or 24 years ago.

6 Int. How do you fix that date?

A. By the time I was attending lectures at the St. Louis medical college.

7 Int. When were you admitted to practice?

A. March, 1866.

8 Int. Was it prior to that time you saw these?

140 A. Yes, sir; prior to that time.

9 Int. Look at Defendant's Exhibit 11 A and state how those instruments differed, if at all, from this exhibit.

A. I have seen very nearly the same instruments where a slide was used to keep the mucous membrane from projecting out of the cylinder, and would be pulled out the proper distance for the purpose of the mucous membrane projecting within the view of the speculum.

10 Int. When was that?

A. That I think was during the year- 1864, '5, or '6.

11 Int. Were they common?

A. I don't know as to that. I know they were lectured upon—the various ways of examining the rectum.

13 Int. Who lectured upon them?

A. Professor Charles A. Pope.

14 Int. Is he living?

A. No, sir; he is dead.

15 Int. Have you seen such instruments occasionally between that time and the present?

(Objected to as leading.)

A. I have seen such instruments where they were quicksilvered inside for the purpose of reflection, and with a slide or opening—fenestra, as it is called.

141 16 Int. What, if anything, was there used in connection with this form of speculum, Exhibit 11 A, in the 60's?

A. I am not absolutely sure that I know. The inside was quicksilvered for reflection—to cast a light, so that we could examine it more perfectly.

17 Int. Do you know of an inclined mirror having been used in connection with it?

(Objected to as leading.)

A. I don't remember perfectly about that.

18 Int. When did you first see an instrument having an incline in the front end of the tube, if ever?

A. Yes, sir; I have seen an instrument of that kind. I am not sure when I did see it.

19 Int. As much as ten years ago?

(Objected to as leading.)

A. Probably.

(Answer also objected to for same reason.)

20 Int. What is the best of your knowledge as to that?

A. Well, it was certainly—it may be about that neighborhood. I am in no way sure about that.

21 Int. Have you ever used an instrument yourself—did you ever use an instrument yourself having an incline in the end of the tube?

A. No; never did.

142 22 Int. Did you ever use an instrument having a slide extending the length of the tube?

A. No, sir; never have. I have used the old Ferguson speculum.

23 Int. Did you ever use in connection with the Ferguson instrument an incline mirror in the handle?

(Objected to as leading.)

A. No; but I have seen it used.

(Same objection to answer.)

24 Int. How long ago?
A. Probably all of 14 years ago.
25 Int. Where—in this city?
A. Yes. I have seen Dr. Hodgen use it.
26 Int. Please state how they were used.
A. He used to use the laryngoscope glass or mirror in various positions.
27 Int. Look at Defendant's Exhibit A 1, and state if that is what is known as the Ferguson speculum.
A. Yes; that is it.
28 Int. And look at Defendant's Exhibit 2 A and state whether that is a form of mirror used in connection with Exhibit 1 A.
A. It may not be exactly, but it is upon that general idea—the mirror fixed in the handle at such an angle as he could see.

143 29 Int. Look at Defendant's Exhibit 9 A, and state when you first saw such an instrument, if ever, before.

A. I don't know whether I have seen it before. I have seen something similar to it, and these things, I can say, a certain class of the profession is not given very largely to using.
30 Int. What difference, if any, is there between Exhibit 9 A and those that you saw?
A. Of this kind?
31 Int. Yes, sir.
A. Really I don't know. I know that the essential idea is that there was a blunt end for the purpose of not injuring the mucous membrane.
32 Int. Was there an incline?
A. There was an incline.

(Question and answer objected to.)

33 Int. How about the plug?
A. The plug was there for the reason that it could not be very well introduced without it.
34 Int. How long do you know of such instruments being used?
A. I can't say exactly; not less than 5 or 6 years; probably more than that.

Cross-examination by J. C. SMITH, Esq.:

144 1 X Int. Doctor, I understood you to say that you saw a speculum with a slide fully 20 years ago in the hands of Dr. Pope.

A. Yes, sir.
2 X Int. What was he doing with it?
A. Lecturing before the class.
3 X Int. Do you know whether that instrument was ever patented or not?
A. No, sir.
4 X Int. Have you ever seen it since?
A. That particular instrument?

5 X Int. Yes, sir.

A. No, sir.

6 X Int. Did you ever operate with that instrument?

A. No, sir.

7 X Int. Did you ever operate upon a patient with one like it in construction?

A. No, sir.

8 X Int. For what purpose was that instrument made?

A. It was made for the purpose of examining the rectum, and at that time a larger tube was also made for the examination of the vagina.

9 X Int. Were there two tubes in the instrument?

A. Yes, sir; they had different sizes for the speculums.

10 X Int. Two in the same speculum?

A. No, sir; different sizes.

11 X Int. Did the slide in that case extend the full length of the slot from end to end and cover it?

A. My conception was it did for the purpose of forming a smooth surface in order to introduce without injury to the mucous surfaces.

145 12 X Int. Did you ever have that implement in your hands?

A. I think I did, because I saw it not once, but for near three years. Dr. Pope was a man, I suppose, that had more instruments than any ten of the surgeons in St. Louis at that time.

13 X Int. Had he more than one instrument of this character?

A. That I don't remember.

14 X Int. And you are not positive that you had it in your hands?

A. No, sir.

15 X Int. Positive you never operated with it or one like it?

A. Yes, sir.

16 X Int. Are you familiar with any cases in which that instrument was used for actually diagnosing a rectal trouble?

A. No, sir.

17 X Int. Was there a plug in the larger end as well as in the smaller?

A. No; my recollection of the instrument was that there was a projecting handle at the lower part in order to hold on at the time of introduction and then withdrawing the slide.

18 X Int. Are you certain there was not a plug in the larger end—obturator?

A. I don't remember that the- was anything of the kind in the speculum at that time.

19 X Int. Do you remember that there was not?

146 A. I think there was not on the idea I got. There was not, *not* I think. The instrument at that time consisted, as I say, of a handle below, and then there was in addition to that a little curved point pulled out at the same time that the instrument was introduced, just as you desired it.

20 X Int. You never saw it introduced?

A. No, sir.

21 X Int. Was not that slide hinged—hinged on the side so that it fell along inside the wall of the speculum?

A. No; I think not.

22 X Int. Was there any means for retaining it in position when it was introduced into the rectum?

A. No; it was my conception that it was fixed in the slot.

23 X Int. You speak of your conception. We are inquiring of your recollection.

A. Then my recollection, as far as it goes.

24 X Int. Was that the first time you ever saw a speculum with a slot in its side and a slide in the slot?

A. Yes, sir.

25 X Int. Did Dr. Pope ever lecture to you how that could be used with a mirror?

A. No; Pope didn't.

26 X Int. Could you from your recollection and not from anything you may have seen since that date make a sketch of that speculum?

A. I think I could.

147 27 X Int. Could you do it accurately?

A. I don't know whether accurately; but I could give you my recollection as far as I have got it.

28 X Int. How was the front angle of the interior of the tube arranged?

A. I think it was the ordinary cylinder, rounded inside, and the front end of the wall was vertical or oblique—the front end of the interior of the cylinder itself. It was just the ordinary cylinder, of necessity being convex exteriorly and concave interiorily. I am speaking of the front end of the interior of this cylinder, the part you call the plug. Here (refer-ing to Ex. 1 A). It was more convex than that.

29 X Int. The interior corresponded to the exterior?

A. Yes; as near as I can recollect.

30 X Int. Have you paid very much attention to these instruments during the past ten years?

A. No; I have not; because I use a different line of speculums entirely.

31 X Int. What do you use ordinarily?

A. I am in the habit of using Simms' wire speculum. That is a lever speculum which we press between the hands in order to press the sphincter open, and very often use an ordinary Simms speculum, Exhibit 10 A.

148 32 X Int. I understood you to say that you could not remember when you first saw a speculum with a slide in its side and an inclined front with an interior opening?

A. Yes; you are correct in that.

33 X Int. Would not undertake to tell whether it was three or four years?

A. No, sir; because I have an indefinite idea of that thing.

Redirect examination by GEO. H. KNIGHT, Esq.:

1 Int. When you refer to an incline in front in combination with the slide, do you mean a permanent, fixed incline or do you also include a mirror?

A. I have seen the laryngoscope used in conjunction with the ordinary old-time Ferguson speculum, Defendant's Exhibits 1 A and 2 A.

2 Int. You stated on cross-examination that you never saw Exhibit 11 A actually used.

A. No, sir.

3 Int. Did or did not Pope describe the use of it to the class?

A. Yes, sir; that was part of the teaching.

W. B. OUTTEN.

149 HERMAN SPACKLER recalled and examination-in-chief resumed by GEO. H. KNIGHT, Esq.:

54 Int. How long did you say you had been engaged in the manufacture of surgical instruments?

A. Since 1853.

55 Int. As an expert in this business I will ask you what, if any, different function the incline on the end of Plaintiff's Exhibit C produces when used in connection with the slide that it does not perform or produce when used by itself.

A. I guess that is a question for a surgeon. We make the thing, but don't use them.

56 Int. I am merely asking your opinion as an expert in the manufacture of instruments. I will ask you, first, what is the function of the incline?

(Question objected to, as the witness has not shown he is competent to testify as an expert in this subject-matter.)

A. According to my idea the function of the incline plane is that the instrument is easily withdrawn without the membrane having a chance to cut.

57 Int. In your opinion does it or not perform that function differently when used in connection with a slide?

150 (Objected to for the reason that the witness has not shown himself an expert in this subject-matter.)

A. I think it is the same, for the instrument when withdrawn—there is always a slide generally open to a certain extent. It is easy to withdraw.

58 Int. Does or not the incline, in your opinion, operate differently when used in connection with the slide than when used by itself?

(Objected to for want of competency on the part of the witness to testify to that subject-matter.)

A. If the slide is not there of course the instrument might be used just as well, provided there were no sharp corners on the slot, and act just the same.

59 Int. What is the office of the slide?

A. The action of the slide, according to my opinion, is to protect a certain portion of the membrane from falling into the instrument and just expose a certain portion they want to operate on.

60 Int. Would it perform that function any differently in the absence of the incline?

A. It would perform the same function, certainly.

(Question and answer objected to as incompetent.)

61 Int. Do you mean it would perform the same function if the incline were not there?

(Objected to as leading.)

151 A. Certainly it would.

(Answer also objected to for same reason.)

Cross-examination by J. C. LEE, Esq.:

1 X Int. What is your business now?

A. Instrument-maker.

2 X Int. Do you carry on business alone?

A. No, sir.

3 X Int. Are you employed by some other?

A. By A. S. Aloe and Co.

4 X Int. How long have you been employed by them?

A. Three years this month.

5 X Int. Had you been in the employ of A. S. Aloe and Co. before that?

A. No, sir.

6 X Int. Had A. S. Aloe and Co. been a purchaser of your surgical instruments?

A. Once and awhile.

7 X Int. Has your business since 1853 been mainly a manufacturer of surgical instruments?

A. The most — time, with interruptions of a few months, and then during the war.

8 X Int. You are not interested as a partner with Mr. Aloe in his business?

A. No, sir.

9 X Int. Simply employee?

A. Yes, sir.

10 X Int. In your examination-in-chief you spoke of an old rectal and vaginal speculum, saying that some were made of glass and some of ivory and some of metal. Are any of those old in-
152 struments now manufactured or furnished to the profession?

A. Yes, sir.

11 X Q. What ones?

A. The glass Ferguson speculum is the only one, I believe.

12 X Int. Have you here to-day seen what you call a glass Ferguson speculum?

A. No, sir; I have not.

13 X Int. What was, in general terms, the structure of that Ferguson speculum?

A. It was a straight cylinder, open on both ends, the front end beveled or rounded off, and the other side was flanged out. Some were made of glass, not covered, and others of glass, covered outside with black and inside with quicksilver coating.

14 X Int. That instrument didn't have a slide?

A. No, sir.

15 X Int. The ivory instruments are not now made or furnished to the profession, to your knowledge?

A. No, sir; because they are too expensive.

16 X Int. The old-style metal speculum are not made or purchased by the profession, to your knowledge?

A. No, sir.

17 X Int. In your examination-in-chief you were shown Defendant's Exhibit 11 A, having a glass slide. When did you first see that instrument, Exhibit 11 A?

A. It was between 1876 and 1878.

153 18 X Int. I mean this particular instrument that you now look at.

A. I believe it is about three or four months ago.

19 X Int. Do you know who made it?

A. Yes, sir; we made the one you have got in your hand in our shop.

20 X Int. By we you mean whom; whose shop do you mean?

A. A. S. Aloe and Co.

21 X Int. In St. Louis?

A. Yes, sir.

22 X Int. Did you superintend the construction of this instrument?

A. Yes, sir.

23 X Int. Under whose direction did you make it or cause it to be made?

A. Our clerk told me to make an old-time Reed speculum and I made it.

24 X Int. You attempted to have it made just as nearly like an old Reed speculum as you could remember the old Reed speculum?

A. No, sir; because I left out the handle.

25 X Int. Where was the handle in the old Reed speculum fixed to the instrument?

A. On the lower side, opposite the slide.

26 X Int. There was no handle fixed to the slide?

A. No, sir.

27 X Int. The interior of the old Reed speculum was just about as near the interior of this instrument as you can remember it?

A. Yes, sir.

28 X Int. In all respects?

A. Yes, sir.

29 X Int. That old Reed speculum—was it ever manufact-

154 ured by you?

A. No, sir; I merely altered it.

30 X Int. You had worked about it altering and improving it?
A. Yes, sir.
31 X Int. What improvements did you make in the old Reed speculum and when?
A. It was about either in 1876 or that neighborhood—between 1876 and 1878, but not later; it can't be later. What I made was to avoid the abruptness of the shoulder where the slide stops.
32 X Int. Who brought that speculum to you to be changed?
A. That is hard to tell.
33 X Int. Why?
A. Because it is too long — time. I believe it was Dr. Hodgen.
34 X Int. He is dead?
A. Yes, sir.
35 X Int. When did he die?
A. If I remember right, about five or six years ago.
36 X Int. Where did he die?
A. In St. Louis.
37 X Int. What has become of his supply of surgical instruments if you know?
A. I don't know whether his son has them or not.
38 X Int. Does his son live here?
A. Yes, sir.
39 X Int. Does he practice surgery here?
A. Yes, sir.
155 40 X Int. In the same office where his father used to practice?
A. No, sir.
41 X Int. Did he continue in practice with his father until his father's death?
A. No, sir. Young Hodgen was not here when his father was living.
42 X Int. How soon after his father's death did he begin practicing?
A. I don't know.
43 X Int. When young Hodgen began practice in St. Louis was it in the same office his father had been practicing?
A. Yes, sir.
44 X Int. That office has been moved since?
A. Yes, sir; once.
45 X Int. Whereabouts were you carrying on business when you made that change in the instrument?
A. Pine between 7th and 8th.
46 X Int. How long did you have your shop on Pine between 7th and 8th?
A. I had it there from 1872 or '73 up to 1878.
47 X Int. What time in 1878?
A. I believe it was late in the fall.
48 X Int. Have you the means of getting at precisely the time you went to that place and the time you left that place?
A. I believe I could.
49 X Int. I wish you would do so.

A. Yes, I will.

50 X Int. When you left that place on Pine street where did you go to with your shop?

156 A. Corner of 8th and Olive.

51 X Int. How long did you remain at the corner of 8th and Olive?

A. Not very long; about 2 and ½ years.

52 X Int. And then where did you go?

A. Then I went to A. M. Leslie & Co. and worked for them with my tools.

53 X Int. How long?

A. I was with Leslie a couple of years. I believe it was in 1881 I went there, or '82; also have a memorandum of that, I believe.

54 X Int. And when you left Leslie & Co. where did you go?

A. Aloe and Co.

55 X Int. And you have been with them since?

A. Yes, sir.

56 X Int. Have you a book—either a shop book or book of accounts—that will show the time you did that work on that instrument and who brought it to you?

A. I believe not.

57 X Int. Why not?

A. The reason why is that those good doctors were mostly cash pay.

58 X Int. I don't understand that you are certain that it was Dr. Hodgen that brought you that instrument to be changed.

A. I believe sooner that he was than he was not.

59 X Int. It might have been some other doctor?

A. That might be.

60 X Int. Have you seen that instrument since?

A. No, sir.

157 61 X Int. Have you ever changed or repaired any other instrument of the Reed make as you changed and repaired that one?

A. I believe so.

62 X Int. When and where?

A. At A. M. Leslie's, while working for them.

63 X Int. Do you know who brought that instrument to you?

A. No, sir.

63 X Int. Don't know who took it away?

A. No, sir; because I had nothing to do with the store.

64 X Int. What is it you say you did to that instrument?

A. I made a new mirror in the incline plane.

65 X Int. That mirror was made of glass?

A. Yes, sir.

66 X Int. Whereabouts was it located?

A. At the end of the instrument, where the slide stopped.

67 X Int. Is that the mirror you fastened in with plaster of Paris?

A. Yes, sir; first with shellac and spoiled it.

68 X Int. Whether the instrument worked or not you don't know?

A. No, sir.

69 X Int. You don't know whether your mirror came out or not?

A. I believed that it was O K.

70 X Int. But you never saw or heard of it afterwards?

A. No, sir.

71 X Int. Can you think of any other Reed speculum that you changed than the two?

158 A. No, sir.

72 X Int. Did you make the same change in the Reed speculum that you worked on at Leslie's that you made on the one at Pine St.?

A. It was the same thing. I made also the glass mirror in it.

73 X Int. And did you do it in the same way?

A. I did it in the same way.

74 X Int. And you have not seen that instrument since?

A. No, sir.

75 X Int. How is it that you are able to say you made that change when you were on Pine St. rather than when you were at the corner of 8th and Olive? How are you able to say that you did it at one place and not at another?

A. The reason that I remember about it is in the position of my benches and the kind of work we made then most; that makes me certain it must have been made on Pine St. than on Olive St., because when I was on Olive St. I was on the down grade.

76 X Int. What has the term "grade" to do with the making of this repair?

A. I had very little to do any more.

77 X Int. Would you swear that you didn't make this repair or change after your removal to 8th & Olive?

A. Yes, sir.

159 79 X Int. Positively?

A. I know positively it was before that time.

80 X Int. What month in 1878 was it that you moved to the corner of 8th and Olive?

A. I couldn't tell that exactly anymore; I believe my books show when I paid the last rent.

81 X Int. You say it was the last of the fall?

A. Yes, sir; I believe so.

82 X Int. Who was your landlord? To whom did you pay your rent on Pine between 7th and 8th?

A. Wolff and Company.

83 X Int. Where were they located then and now?

A. Then, I believe, on Chestnut St., at that time.

84 X Int. They sent their collector to you?

A. Yes, sir.

85 X Int. At what number were you on Pine street?

A. I believe it was 709½, north side of street. I don't remember the number now; there is a restaurant in it now.

86 X Int. Which side of the street?

A. North side of the street.

87 X Int. Have you not, Mr. Spackler, given it as your recollection since this examination began that you removed from Pine street in the year 1879?

A. It may be that year; I don't pay any attention to that.

88 X Int. It may be as late as the fall of '79 that you removed?

A. It may be, but I hardly believe it was.

160 89 X Int. How long have you now been with A. S. Aloe and Company?

A. This month, I believe, about three years.

90 X Int. How long with Leslie and Co.?

A. I believe a little over two years.

91 X Int. How long were you at the corner of 8th and Olive?

A. Either two or three years.

92 X Int. And you went to the corner of 8th and Olive from Pine street?

A. Yes, sir.

HERMAN SPACKLER.

161 ANDREW LESLIE, being duly cautioned, sworn, and examined as a witness on behalf of defendant, deposes and says:

Examined by AUGUSTUS BINSWANGER, Esq.:

1 Int. State your name, age, residence, and occupation.

A. Andrew Leslie; age 43; residence, St. Louis; occupation, surgical-instrument maker.

2 Int. How long have you been engaged in that business?

A. In surgical instruments since 1857.

3 Int. In the city of St. Louis?

—. ——.

4 Int. You manufacture instruments yourself?

A. With my own hands? No, sir; entirely by employees; I don't work with my own hands.

5 Int. Have you been selling surgical instruments ever since you have been in business?

A. Yes, sir; with the exception of three years that I was out of business. But I have been selling continuously from 1857 with a few intermissions. The intermission was from 1857 to 1860, and then for three years, from 1874 to '77.

6 Int. Have you handled any rectal speculums during that time?

A. Constantly, sir.

7 Int. What rectal speculums have you knowledge of—the earliest period?

162 A. I would recall, now, what we call the glass reflecting speculum; cylindrical, closed at one end, with an opening on the side. At the same time there was a form called Ricord's, known as the bivalve. Those two were the earliest forms.

8 Int. Can you describe the glass reflecting speculum?

Q. I think the description I gave covers it.

9 Int. Prior to 1878, what other speculums did you have any knowledge of and handle?

A. Well, there were a good many. There was what was known as the Simms, made in extra small size for rectal use. Then there was a trivalve speculum, illustrated now in most of the catalogues. I don't remember whose name attaches to it. I could find it with a catalogue, I suppose.

10 Int. Look at this catalogue and see whether it is illustrated here (hands witness Exhibit 12 A).

A. Yes; it is the speculum No. 5400 in this catalogue, Shepard & Dudley, page 840; and there is another—5408—which is an old form. That is one of the oldest and ranks with the first two I mentioned; it is one of the oldest; it is a two-bladed instrument, so arranged that the hinge of the instrument runs along the entire length of the adjoining edges of each of the blades so that
163 when it is open it leaves a slot like from the interior to the exterior end. Then there is the Squire's speculum here (Exhibit 9 A). That, as near as I can remember, is 10 years old or more. There have been other forms. There is what is known as Nott's. That is a modification of his vaginal instrument—a three-bladed—dissimilar to any here.

11 Int. Have you knowledge also of Reed's speculum?

A. I have seen it illustrated in the Philadelphia catalogues for some time. I can't say how long, but it is some considerable time. I can't hardly fix the time.

(Answer objected to as incompetent.)

12 Int. Will you examine Squire's speculum, Exhibit 9 A, and state whether it is in the form you handled some upwards of 10 years ago?

(Objected to as leading.)

A. That is the form in which I have handled it; at least it is the form in which we first had it; it is the first form of this speculum. There is in the last two or three years a modification in this incline, but this is the earlier instrument. The change they made was to facilitate the withdrawal and give it a little more incline and concave form.

13 Int. But in what respect does this instrument differ from the oldest form?

A. This is the oldest form.

164 14 Int. Then the modifications you speak of are not in this instrument?

A. No, sir; they are recent; within two or three or four years.

15 Int. Will you please look at Exhibit 1 A and state whether or not you have handled such instruments?

A. Yes, sir; a great many. A great many are sold because it is cheap.

16 Int. What, if anything, was used in connection or conjunction therewith?

A. As to the practical application of the instrument I am not fa-

miliar. I have seen a great many surgical operations and must except rectal treatment, because I never considered it interesting. There are a great many instruments used in conjunction with it. There are probes used in conjunction with it to find fistulas and post-caustics used for treatment and forceps for dragging down piles, and other instruments, and sometimes a reflector is used examining more exactly ulcerous spots, just as in the throat.

17 Int. Is this or either of these the forms of the reflectors?

A. Yes, sir. They differ in size sometimes. They are smaller and sometimes of polished metal.

18 Int. Are they always circular in form?

165 A. Usually circular; more frequently. I don't know that I have ever seen or known of any other forms being used. These are instruments which have a general application. Their purpose is to explore cavities which you can't get a direct vision of; anything situated laterally.

19 Int. Do you know of any speculums with slides attached?

A. You mean any kind of speculum?

20 Int. Yes, sir.

A. Yes, with sliding portions. A speculum in which one portion is intended to be removed to uncover the surface of the cavity intended to be examined is an old plan. I have in mind specially speculums. One of the oldest forms consisted of three blades which dilated around the axis of the instrument—that is, there were three blades and hinge here and one there, and by pressing the handles here it opened into a cylindrical form. Then one of the sides was capable of removal for its entire length.

21 Int. How old is that slide?

A. It was made before I was in business. One of the oldest forms.

22 Int. Will you examine this book handed you (offered in evidence and marked Defendant's Exhibit 13 A), on page 60 and part III A, and state whether or not the speculum as shown in

166 the cut is the one described by you?

A. Yes, sir; figures 196 A and 196 B on that page.

23 Int. That was known as what instrument?

A. Segalla's. The upper blade there is removable. There is a little thumb catch which you press, and that releases a little spring that held it in place. Then that blade can be withdrawn to any degree. I also remember that a model came into our place in or previous to 1860 which had an arrangement so that the blades could be removed. It was a vaginal speculum, with some 16 to 20 blades, and which were hinged about ¼ of the way from one end, and you could distend the whole set. As it stood closed it was in a conical form, apex of the cone being at the inner end of the instrument, in the body. When it was in use, then those blades could be arranged to dilate, so that the apex of the cone became the base, increasing many times larger than the outer end. Then you could remove any number of these blades you wanted all the way around from one to any portion, including the whole.

26 Int. How long do you personally know of the slides being used in such instruments?

167 A. It is as long as I know anything about the instrument—30 years; this slide here.

27 Int. Can you state whether or not this mirror, Exhibit 2 A, was ever used in connection with this instrument?

A. You mean what I know, of my own knowledge, from seeing it used, or knowledge of the business?

28 Int. Knowledge of the business.

A. I only know that this instrument is used to examine all of the cavities of the body; not only the vagina and rectum, but urethra and ear. I have made them the same in form as this, but of polished metal, as the glass was too thick, but the same in form, and reduced speculums to pass into the ear.

29 Int. Do you know of their being used in connection with a speculum?

A. They were always used in connection with speculums, except in the mouth; but in the urethra, vagina, and rectum they must be used in connection with the speculum.

30 Int. Do you know how long they have been used in connection with the speculum?

A. Quite as long as the instrument has been in use at all.

168 This instrument was brought out first for — in the throat, and my remembrance of it dates from 1861, and ever since then the instrument has been used in connection with the speculum.

31 Int. Can you state for how long a period you know of an incline being used in a speculum?

A. The only remembrance that I have of an incline that I can call to mind is Squire's Exhibit 9 A.

32 Int. When you speak of the incline do you mean simply the stationary or those that were added?

A. I refer to anything that was fixed to the instrument.

33 Int. The removable incline, then, such as in Exhibit 2 A, that was used prior to the fixed incline to the instrument, to your knowledge?

A. Yes, sir.

34 Int. Are you connected in any manner with Aloe in business?

A. No, sir. We are compeditors.

35 Int. Active to each other?

A. We are on good terms, but we work for ourselves as hard as we can. We don't quarrel.

36 Int. Are you related in consanguinity to Aloe?

A. No, sir; in no way. We are entirely independent in all our concerns.

169 Cross-examination by J. C. LEE, Esq.:

1 X Int. You are not a practicing physician and surgeon, and never have been?

A. I am not and never have been.

2 X Int. When you in your examination-in-chief have stated the

uses that are made of the different instruments to which your attention has been called you give such answers based on your general understanding of the use?

A. I have some considerable opportunity to observe the use of instruments, but, as I stated, my observation in the use of rectal instruments is very limited.

3 X Int. Did you ever see any of the instruments about which you have been testifying used in the treatment or discovery of a rectal disease?

A. I have not.

4 X Int. You have never seen Exhibit 2 A used in the examination of or treatment of a rectal disease?

A. I have not.

5 X Int. You have never seen Exhibit 9 A, known as the Squire's speculum, used for any purpose, have you?

A. I have not.

6 X Int. Why do you call, if you do, Exhibit 2 A a movable incline?

170 A. I didn't know that I had called it a movable incline.

7 X Int. Do you denominate it a movable incline?

A. I should call it a reflector. That would be my term for it.

8 X Int. That is, in fact, the office, so far as you know or have any actual knowledge on the subject, that it performs?

A. That is all that I ever knew of its being used for.

9 X Int. I now wish to call your attention more particularly to Exhibit 9 A, Squire's speculum, so called, and ask you if you know by whom that speculum is now or has been manufactured.

A. We have always obtained it from Codman and Shurtleff, of Boston.

10 X Int. They are surgical-instrument makers?

A. Yes, sir.

11 X Int. You have never known any other instrument-maker to make it?

A. I never have. I am not aware of any one else making that form.

12 X Int. How did you first come to buy it—on solicitation from Codman & Shurtleff?

A. Yes, sir; seeing it in the samples their travelling man would show, I presume.

13 X Int. Do you know the name of the travelling man or men from whom you first got it?

A. I cannot recall.

14 X Int. Give the names of such of the travelling men

171 of that house, as you now remember, with whom you have dealt.

A. Mr. Crockett, Molloy, and Gear.

15 X Int. Do you know of any other house in St. Louis handling or dealing in the Squire's speculum?

A. I don't know whether any of the other dealers have. I don't often go into their places and don't know.

16 X Int. Did this Exhibit 9 A come from your establishment?

A. I can't identify it as coming from my place.

17 X Int. State whether or not it is identical in structure and appearance with such of them as you handle.

A. It is in structure with such as I handled, but, as stated, they have slightly altered the form of that inclined portion within a few years.

18 X Int. How many years?

A. Three years, I think, would be the period in which the change occurred.

19 X Int. Can you get at the exact date on which you got or bought the first invoice of the Squire's speculums?

A. No, sir.

20 X Int. Why not?

A. Because the invoices for that time are lost or destroyed.

21 X Int. Can you not refer to your books of some kind
172 and get at the exact date you first got that sort of instrument from Codman and Shurtleff?

A. The only way I could determine that would be to find the invoice. There is no other record of it. I can look and see how far my invoices go back.

22 X Int. Had you been dealing with Codman and Shurtleff prior to your purchase of the Squire's speculums?

A. Yes, sir; we have been dealing with them ever since we have been in business; 1857.

23 X Int. Have you had a general fire, burning out your invoices that covered the first invoice of the Squire's speculum?

A. They were burned purposely to get rid of the papers.

24 X Int. Do you mean burnt in the course of disposing of old papers?

A. Yes, sir.

25 X Int. And not for the purpose of getting rid of such rather than other invoices?

A. No, sir; I had a clearing out. When I got too many papers I then burned the whole thing up. The invoices I think I burned. Some I sold for waste.

26 X Int. Would you undertake to state positively under oath that you got such an instrument from Codman & Shurtleff until within the last eight years?

A. I would want, if I am to make an absolute statement, to
173 review my papers and books and see what the earliest period is.

27 X Int. Will you do so?

A. Yes, sir; I will.

28 X Int. Was the incline at the inner end of the tube of the Squire's speculum there when you first received that Squire's speculum from Codman and Shurtleff?

A. Yes, sir; it was there from the first. That was the distinguishing peculiarity of the instrument.

29 X Int. You have never seen one of that character until you saw the Codman and Shurtleff speculum?

A. You mean one with that slide? That is the first I can recall with that special slant.

30 X Int. Perhaps you might speak to us a little more definitely and fully of the change you refer to in the Squire's speculum as to the incline at the inner end of the tube.

A. I will state as much as I can now state with confidence. It consists in giving it a concaved surface here instead of a flat or plain surface. It is cut out hollow in there slightly.

31 X Int. Is the slant of the incline concaved, as you remem-
174 ber it, about the same as that of the instrument you now hold in your hand, Exhibit 9 A?

A. This is not concaved at all. It is the same as this with this tapering laterally. The concavity does not change the angle of the slant.

32 X Int. Can you say whether you have ever handled the Squire speculum changed so as to have a concavity in the slant, as you mention?

A. Yes, sir; I have sold them.

33 X Int. At the same time you were selling that kind were you also selling this kind?

A. No, sir; after the second kind came in that was considered the later form and we discontinued this.

34 X Int. You have named three travelling salesmen for Codman & Shurtleff. Are they yet all three in that service?

A. No, sir; Molloy has left the house. Crockett—I don't know whether he is with the house or not. Gear is their present traveler.

35 X Int. How long since Molloy has visited St. Louis and solicited you for goods?

A. I would have to rely upon Mr. Aloe's recollection. Trusting my memory, I should say about 6 years ago.

36 X Int. Crockett you think is with the house?

A. I have not heard of his leaving.

175 37 X Int. How long since he appeared here to solicit trade?

A. 8 or 10 years.

38 X Int. How long since Gear was here?

A. Two or three months.

39 X Int. But from which of these three it was that you first obtained the Squire's speculum you can't say?

A. Not with certainty, but I think it was from Crockett.

40 X Int. And can you not yet say whether you can determine the time you got the first?

A. Unless I can find the invoice I cannot state the time closely, but I will endeavor to get the information.

(Witness was excused for the purpose of getting dates asked for; but upon returning without information the cross-examination was announced by J. C. Lee, Esq., as closed.)

ANDREW LESLIE.

CHARLES E. MICHEL, of lawful age, being produced, examined, cautioned, and sworn as a witness on the part of defendant, deposed as follows:

Examined by GEORGE H. KNIGHT, Esq.:

176 1 Int. Please give us your full name, age, residence, and occupation.

A. Charles Eugene Michel; 54; residence, St. Louis; physician and surgeon; oculist at present.

2 Int. How long have you followed the profession of surgery?

A. 30 years.

3 Int. Up to what period?

A. Up to ten years ago.

4 Int. Where did you practice prior to ten years ago?

A. St. Louis; not the entire time.

5 Int. How long did you practice in St. Louis?

A. After the war. I was in the army, and prior to that in the hospitals of Europe.

6 Int. Are you familiar with what is known as rectal speculums?

A. I am.

7 Int. State when you first used such an instrument.

A. 1855.

8 Int. State when you first used such an instrument in this country.

A. 1855.

9 Int. How was that instrument made?

A. At that time it was a simple tube with an opening at the end—fenestrated opening.

10 Int. State when you first know of a rectal speculum being used, if ever, having a slide extending the length of the tube.

A. I can't fix that date.

177 11 Int. How long do you know of such instruments being used?

A. A little explanation will clear that point. A speculum is what we call an endoscope, and speculums had the slide prior to 1857. I can't say how long.

12 Int. Did or did not the slide extend the entire length of the tube?

A. It did.

13 Int. As long ago as that?

A. It did. It could be varied. It was a slide that could be varied from one end to the other, made larger or smaller—that is, greater or less—in length. It was a slide passing the full length of the instrument.

14 Int. Were such instruments in general use at that time?

A. Yes, sir; I had them myself.

15 Int. When, if ever, did you first know of speculums being used with an incline in the end of the tube?

A. About '57.

16 Int. Were they in general use?

A. By all eminent men in Europe at that time.

(Answer objected to as incompetent.)

17 Int. In this country?

A. That I cannot assert, as I was in Europe.

18 Int. When did you know of their being first used in this country?

A. The incline, you mean?

178 19 Int. Yes, sir.

A. In 1860.

20 Int. Were they in general use?

A. They were.

21 Int. Does that apply also to the slide that you have described?

A. Yes, sir; I had the instruments and used them myself.

22 Int. I ask you as an expert in the use of such instruments whether, in your opinion, the slide produces any different result when used in connection with the incline than when used by itself.

A. I can answer that in this way: With the old speculum that I said was used in 1857 we could see the same parts that we do to-day with the incline and slide, or the two combined.

23 Int. Then, as I understand it, it does not perform any different function when used with the incline?

A. We used this instrument to make a diagnosis, and the same diagnosis could be made formerly with the simple speculum used in 1857 as we did with the combined instrument.

24 Int. How about the incline? Does it or not perform any different function when used with the slide?

A. The same part is viewed with the incline or without it

179 or with the slide or without it, as was viewed with the old speculum. I will explain that surgeons could formerly diagnose the same diseases as they can with the combined instrument which we have here to-day.

Cross-examination by J. C. LEE, Esq.:

1 X Int. Where did you study your profession?

A. Charleston, South Carolina.

2 X Int. Up to what time did you continue your practice there?

A. Until 1857.

3 X Int. I understand that you were a general practicing physician and surgeon?

A. I was a student at that time, but I had practiced with my preceptor.

4 X Int. When you ceased to practice at Charleston where did you next practice?

A. At the hospitals in Paris, under the surgeons of the hospitals.

5 X Int. How long did you continue your practice abroad?

A. Until December, 1859.

6 X Int. Did you resume practice in this country?

A. I did.

7 X Int. When and where?

A. In 1860, in Charleston, South Carolina.

8 X Int. How long did you continue it there?

A. Six months.

9 X Int. And from that point you transfer-ed to what point?

180 A. St. Louis, Missouri.

10 X Int. And you have practiced your profession of medicine and surgery until within the last ten years?

A. I did.

11 X Int. And during the last ten years you have devoted yourself to diseases of the eye?

A. I have.

12 X Int. And during the last ten years then you have not treated rectal diseases?

A. No, sir.

13 X Int. From the time of your return to this country, in 1859, until you ceased general practice ten years ago, was the treatment of rectal diseases made a specialty by you?

A. No, sir.

14 X Int. About how much experience did you have from 1859 until 1878 in the treatment of rectal diseases?

A. As much as the ordinary practitioner.

15 X Int. Making about how many cases on the average during the 18 years annually.

A. That would require a computation that I am unable to make.

16 X Int. As many as 10 cases annually?

A. Fully.

17 X Int. More than that?

A. Yes, sir.

18 X Int. As many as 20 cases on the average annually?

A. Yes, sir; I suppose it would be.

181 19 X Int. Would you suppose it was more than 20 cases annually on the average?

A. Yes, sir.

20 X Int. 25, perhaps?

A. Probably.

21 X Int. The implements or instruments you used to discover and treat rectal diseases in this country, were they such as you owned yourself at the times you used them?

A. I would have to think whether I borrowed anybody else's instrument; I think I perhaps borrowed somebody else's instruments sometimes.

22 X Int. Have you those instruments that you did own and use for the treatment of rectal diseases now?

A. No, sir; I don't suppose I have.

23 X Int. Have you any of them?

A. Rectal instruments?

24 X Int. Such as you used in this country from 1859 for the examination of the rectum.

A. No, sir; I have not.

25 X Int. You treated piles and some rectal cases without the use of the speculum, didn't you?

A. External affections; yes, sir.

26 X Int. In how many cases on the average annually, from 1859 until 1878, did you probably use a rectal speculum?

A. Probably 8 or 10.

182 27 X Int. Can you remember whether in the treatment of any of those cases during that time you resorted to the use of the knife or other cutting implement of surgery?

(Objected to as incompetent and immaterial.)

A. Yes, sir.

28 X Int. About how many or what percentage of the total number?

(Same objection.)

A. Of the ten probably one or two; ordinarily they didn't need surgical interference of that kind.

29 X Int. We wish now, Doctor, to have you give us the first instrument you used in this country in the nature of a rectal speculum, by what name known.

A. I can't give you that.

30 X Int. Can you give its construction?

A. I can.

31 X Int. Give it.

A. A tube with a fenestrated opening.

32 X Int. At what point was the opening, at the side or inner end?

A. At the side.

33 X Int. Did that speculum consist of a single piece?

A. Yes, sir; it did.

34 X Int. What was the inner surface of that speculum?

A. Silvered.

183 35 X Int. Was it substantially the same as the instrument now shown you, Exhibit 1 A?

A. It was substantially that instrument.

36 X Int. Did you continue to use that sort of instrument until you ceased practicing in rectal cases?

A. I did.

37 X Int. Did you use during that time any other instrument in the discovery, treatment, or diagnosis of rectal diseases?

A. Practically, I think not; I don't remember any. I may have made additions at the time, but that was practically the instrument I ordinarily used.

38 X Int. You didn't have then or use yourself any rectal speculum during the course of your practice in America in which there was a slide?

A. I did; but not for the rectum.

39 X Int. For what purpose did you use an instrument having a slide?

A. For the vagina.

40 X Int. Have you such instrument now at your command?
A. I think I have.
41 X Int. Will you produce it?
A. I will.
42 X Int. Not dispensing with the introduction of it, I will ask you first for its general description.
A. It is a three-bladed speculum folded on a stem, one of the valves being movable as a slide and the other two hinged.
184 43 X Int. Hinged?
A. The two that were hinged constituted ⅔ of the periphery of the instrument.
44 X Int. Did you, during the course of your practice in this country, use any other rectal speculum than the two you have described?
A. That was not described as a rectal speculum.
45 X Int. You describe it, then, as a vaginal speculum?
A. Yes, sir.
46 X Int. And it is not adapted, then, to the discovery or treatment of rectal diseases?
A. It could be readily used.
47 X Int. But you don't so use it?
A. I have not.
48 X Int. Did you ever know anybody else to use such an instrument for the discovery, diagnosis, or treatment of rectal diseases?
A. No, sir; I do not.
49 X Int. We will take again the question, did you use or see anybody else use at any time in this country any other instrument than you have already described in the discovery, diagnosis, and treatment of rectal diseases?
A. I undoubtedly have; but don't remember any individual instance.
50 X Int. I understood your testimony-in-chief at one point
185 to be to the effect that ever since the year 1855 you have had knowledge of rectal instruments, consisting of a simple tube with an opening at the end; was that a correct apprehension of your testimony?
A. As far as my memory goes, it was on the end or side; I can't say which; but both, I believe.
51 X Int. Do you say that a speculum and endoscope are one and the same instrument?
A. I do.
52 X Int. Why do you say that?
A. Endoscope means view the interior of a cavity, and a speculum is used solely for that purpose.
53 X Int. And, therefore, you would classify the speculum as of the generic-class endoscope?
A. Yes, sir.
54 X Int. Are endoscopes or specula always adapted to the same uses?
A. Undoubtedly.

55 X Int. Have you to-day seen and spoken in your testimony of an instrument known as an endoscope?

A. I have seen several; yes, sir.

56 X Int. Do you wish to classify all instruments that you observe for the discovery, diagnosis, and treatment of rectal diseases as endoscopes?

A. Yes, sir.

186 57 X Int. Please look at Exhibit 8 A in this case and state whether you call that speculum endoscope or something else.

A. I call it either endoscope or speculum; the terms are synonomous.

58 X Int. What is the use to which surgery puts that endoscope in your hand?

A. The viewing of the interior of any cavity into which it can be introduced, and only for the purpose of viewing. It can be used as a catheter if one so desired.

59 X Int. And the use of the catheter is?

A. Catheter is a generic term; can be used in any tube.

60 X Int. To withdraw?

A. You can withdraw or not.

61 X Int. Or inject a fluid?

A. Yes, sir.

62 X Int. Is not that the extent of the office and purpose of the catheter, to inject and withdraw fluids?

A. I have used them as dilators. It can be used for other purposes.

63 X Int. What office does the dilator perform?

A. It dilates the narrow passage; to enlarge it.

64 X Int. For what purpose?

A. If I had a stricture of the urethra and hadn't bougies handy, I would use a catheter and have used them.

65 X Int. The object being——

A. To make a freer passage.

187 66 X Int. And not for the purpose of discovering or diagnosing diseases or the diseased part?

A. A catheter?

67 X Int. Yes, sir.

A. A stricture may be determined by a catheter.

68 X Int. Is it not rather the force and extent of the stricture that you determine rather than the existence of the stricture?

A. Both force, extent, and presence.

69 X Int. Do you now think of any other instrument used by you or within your knowledge to discover, determine, and treat rectal diseases than such as you have already described in your cross-examination?

A. During that period, of course, you are speaking of?

70 X Int. Yes; of course in this country.

A. Not to my own knowledge that I can remember of at present.

71 X Int. In this country prior to your ceasing the general prac-

tice of surgery did you use or see used any speculum or endoscope that had in it a slant or incline such as you see in Exhibit 9 A?

A. I can't say that I did, although I know the instrument.

72 X Int. You don't mean to say that this instrument Exhibit 9 A was seen or known by you until within the last ten years?

188 A. The incline principle that I speak of was similar to that.

73 X Int. I don't ask you for that.

A. You mean that particular instrument?

74 X Int. Yes, sir.

A. No, sir; I never did.

75 X Int. That we may have no misunderstanding, do I understand you correctly that in your practice in this country you never used any speculum having an incline or slant like that you see in Exhibit 9 A?

A. Not for the rectum.

76 X Int. Did you in this country see or use or see any one else use any rectal speculum in the discovery or treatment of rectal diseases having a slant or incline such as you see in Exhibit 9 A?

A. I don't remember at present.

Redirect examination by GEORGE H. KNIGHT, Esq.:

1 Int. Do you remember using yourself or seeing other- use any form of speculum having an incline found in Exhibit 9 A prior to your leaving that branch of the profession, 10 years ago?

(Objected to as incompetent.)

A. I have seen the principle used positively; as to the speculum or not I don't remember.

(Answer objected to for same reason.)

189 2 Int. How long ago?

A. In 1857.

3 Int. Was the incline in common use at that time?

A. As an endoscope?

4 Int. Yes, sir.

(Objected to as leading and incompetent.)

A. Yes, sir.

5 Int. In this country?

A. Yes, sir.

(Question and answer both objected to as leading and incompetent.)

CHAS. E. MICHEL, M. D.

At this point, not being able to complete the examination of witnesses produced by the defendant, the further taking of testimony is adjourned to January 18th, 1888, at 9.30 o'clock a. m.

ELENEIOUS SMITH,
Special Examiner.

And on the 18th day of January, 1888, at 9.30 o'clock a. m., the parties to the above-entitled cause, by their respective solicitors, again appear before the undersigned, special examiner, and the taking of testimony in said cause was then proceeded with as follows:

190 WILLIAM GRADY, of lawful age, produced as a witness on behalf of defendant, being first duly examined, cautioned, and sworn, on oath deposes and says:

Examined by GEORGE H. KNIGHT, Esq.:

1 Int. Give us your full name, age, residence, and occupation.

A. William Grady; salesman, A. S. Aloe and Company, 4th and Olive; residence, St. Louis; age, 27 and ½.

2 Int. What kinds of goods are you engaged in selling?

A. Surgical instruments.

3 Int. How long have you been engaged in this business, and where?

A. About 11 years; 3 years in Philadelphia and 8 years in St. Louis.

4 Int. With whom in Philadelphia?

A. J. H. Gemrig and Son.

5 Int. Are you familiar with what is known as a rectal speculum?

A. Yes, sir.

6 Int. How long have you sold these instruments?

A. Ever since I have been in business—11 years.

7 Int. Are you familiar with the instrument described in the Brinkerhoff patent in suit?

A. Not entirely familiar with it; no, sir.

8 Int. What is your understanding of that instrument?

191 A. My understanding is that it contains a slide and incline—a tubular speculum containing that combination.

9 Int. When did you first, if ever, see a tubular speculum having a slide?

A. When I first went into business.

10 Int. In what year?

A. 1877.

11 Int. What time of the year?

A. Spring. I can't give the exact date; spring of 1877.

12 Int. Please describe that speculum.

A. It is a speculum of tubular shape, containing a slot and a slide with solid end, known as the Reed speculum.

13 Int. Look at this Exhibit 11 A and state whether this is the speculum that you have referred to.

A. That is the speculum; yes, sir.

14 Int. That is one of the kind?

A. That is the Reed speculum?

15 Q. You don't mean this particular instrument, but one of the kind?

A. Yes; one of the kind. That is a model of the instrument.

16 Int. Where and by whom was this particular instrument made?

A. I had that made at our shop, in this city, when this first suit was brought against Mr. Aloe.

17 Int. What was your purpose in having it made?

192 A. To show Mr. Aloe exactly what the Reed speculum consisted of.

18 Int. Was this speculum on general sale in the spring of 1877?

A. It was.

19 Int. Was this instrument sold at that time of the same shape and design as the one Exhibit 11 A?

A. Yes, sir.

20 Int. I presume it was finished up?

A. Yes. The one shown is only a rough model, not finished at all.

21 Int. But, so far as the slide and tube are concerned, it properly represents the speculum sold at that time?

A. Yes, sir.

22 Int. Also as regards the plugged or solid end?

A. Yes, sir.

23 Int. What is the object of making this end solid?

A. The principal object in making the end solid is to admit of its easy withdrawal. There is still another reason why it is made solid, on account of its cheapness.

24 Int. How does it assist in the withdrawal of the instrument?

A. By preventing the membrane from catching in the point of the instrument.

25 Int. State if you know of an incline being used in connection with the instrument.

193 A. There was no stationary incline used with the instrument, but a regular laryngoscopic mirror, the same as used for examination of the throat or used in connection with the speculum in diagnosing rectal troubles.

26 Int. When was it so used?

A. My memory only goes to the spring of 1877, when I first went into business.

27 Int. Look at Exhibit 2 A and state whether that is such an incline as was used in connection with the tube 11 A.

A. That is one of the instruments; yes, sir.

28 Int. What other was used?

A. There were various shapes of laryngoscopic mirrors. Some were elliptical; some were square and round—that is, a circle cut in ½—and the perfectly round mirror here I hold in my hand, 2 A.

29 Int. Look at the mirror I now hand you and request to be marked Exhibit 14 A and state whether that is another form of such mirror.

A. Yes, sir.

30 Int. State when, if ever, you first knew of a stationary incline being used in the end of a tubular speculum.

A. The first I ever heard of a stationary incline was in 1877, the

first year I went into business, and the incline was in a rectal speculum called "Squire's."

194 31 Int. Look at the instrument, Exhibit 9 A, and state whether that is what was known at that time as the Squire's instrument.

A. That is the instrument.

32 Int. State whether or not that instrument was common at that time.

A. To the best of my knowledge it was a rather new instrument at that time. I don't think it had been in the market over three or four years at the most.

33 Int. State whether or not you know of the Reed or Squire's speculum being illustrated in catalogues as early as 1877.

(Objected to as incompetent.)

A. The Reed speculum I know was illustrated; as to the Squire's I don't remember.

34 Int. What was it in?

A. The Reed speculum was illustrated in Shepard & Dudley's catalogue, of New York city, and J. H. Gemrig's, of Philadelphia.

36 Int. When were these respective catalogues published?

A. That I can't say. The catalogue of Gemrig was published before I went with them, in the spring of 1877. It was published before that. Shepard and Dudley's catalogue was out when I went into business, so that it must have been published before that.

195 37 Int. How did these catalogues illustrate the Reed instrument?

(Objected to as incompetent.)

A. By wood cut or electroplate of the instrument?

(Answer objected to.)

38 Int. What did the figure show?

(Objected to as incompetent.)

A. I illustrated an instrument the same as Exhibit 11 A.

(Answer objected to as incompetent.)

Cross-examination by J. C. LEE, Esq.:

1 X Int. In what year were you born and what month of that year?

A. I was born June 28th, 1861.

2 X Int. How old were you when you entered the service of Gemrig, of Philadelphia?

A. I was about 17 or 17¼ or 17 and ½ years old.

3 X Int. What employment or business had you pursued before you entered Gemrig's?

A. I had no employment. I had just come from school. I wish to correct that. I was employed, but not in a regular way, by my brother about three months before.

4 X Int. In what?

A. In the ornamental japanning line.

5 X Int. Had you any knowledge of surgical instruments before you entered Gemrig's service?

196 A. No, sir; I had not.

6 X Int. In what year did you enter Gemrig's service?

A. 1877.

7 X Int. What month of the year?

A. That I cannot say exactly. In the spring—March, April, or May; that I can't say. It was before June.

8 X Int. Why can't you say?

A. Because I don't remember, sir.

9 X Int. What did you begin at when you entered his service?

A. I went there as a clerk.

10 X Int. And as a clerk what were your habitual duties?

A. Looking after the stock and selling goods, when necessary.

11 X Int. Was that in the house?

A. Yes, sir.

12 X Int. You continued in Gemrig's service?

A. Until February, 1880.

13 X Int. Nearly three years?

A. Nearly three years; yes, sir.

14 X Int. And during that time was your employment and service in the house?

A. Yes, sir.

15 X Int. Have you been a travelling salesman at any time?

A. No, sir; I have not.

16 X Int. You have been a salesman in the house during 11 years that you have been connected with the sale of surgical

197 instruments?

A. Yes, sir.

17 X Int. How many years have you been with Aloe and Co.?

A. I came with Aloe & Co. or with Aloe, Hernstein & Co. March, 1880, and have been continuously in the same house ever since.

18 X Int. Same establishment?

A. Well, the firm of Aloe, Hernstein & Co. were dissolved June 1st, 1885, and I then continued with A. S. Aloe and Co.

19 X Int. You remained in the same place of business?

A. Yes, sir.

20 X Int. Are you an educated surgeon?

A. I am not.

21 X Int. Have you ever practiced surgery?

A. No, sir.

22 X Int. Have you ever been present at the performance of surgical operations?

A. Some minor operations.

23 X Int. Have you been present at and witnessed a rectal diagnosis or treatment?

A. No, sir.

24 X Int. When, therefore, you speak about the use of the mounted mirror in a rectal speculum you speak wholly from your

general knowledge of the use of the two and not from any observation of any actual use?

A. I speak not from a general knowledge, but it has been told me by physicians who have bought the instruments for that purpose.

198

25 X Int. And that knowledge is made up wholly from what you have been told by other people?

A. By physicians who have used the instruments.

26 X Int. This Reed speculum, to which you have referred, was on sale when you entered Gemrig's service, was it?

A. Yes, sir.

27 X Int. This Exhibit 11 A is one you caused to be made from memory?

A. No, sir.

28 X Int. How did you get at this form, structure, and design?

A. I got it exactly as it was manufactured before.

29 X Int. How is it that you know it is exactly as manufactured before?

A. Because I have been in Gemrig's factory and have seen it manufactured.

30 X Int. And you remembered just how it looked?

A. Perfectly.

31 X Int. And when you caused this Exhibit 11 A to be manufactured here at Aloe's factory you prepared your design and gave your instructions as to it not from any model or speculum that you had in your hand at the time?

199

A. I gave it from memory exactly as I remembered it as made by Gemrig, of Philadelphia.

32 X Int. How long ago was it that you saw that instrument being manufactured by Gemrig?

A. I saw that instrument manufactured by Gemrig in his factory in 1877.

33 X Int. And last when did you see it manufactured?

A. When I left Gemrig's employ, in 1880.

34 X Int. And from 1880 to the time you caused this Exhibit 11 A to be manufactured you hadn't seen the instrument?

A. Yes, sir; I have.

35 X Int. When had you seen the instrument last before you caused this one to be manufactured?

A. That I cannot say positively.

36 X Int. About when?

A. It has been since I was in Aloe's employ, and I saw it in some samples brought here by the travelling agent of one of the Eastern firms.

37 X Int. What agent and of what firm?

A. That I can't say.

38 X Int. When was it?

A. It has been somewhere in the neighborhood of four years ago.

39 X Int. Are you at all certain of that as to time?

A. Not exactly; I can't say.

200 40 X Q. Can you say it was four years within two years of that time?

A. It was before the firm of Aloe, Herstein & Co. dissolved.

41 X Int. And they dissolved when?

A. In 1885.

42 X Int. How long before that firm dissolved?

A. That I couldn't say.

43 X Int. Are you a practical mechanic in the making of surgical instruments?

A. I make it a part of my business to advance some ideas in that line.

44 X Int. Be kind enough to answer my question, whether you are a practical mechanic in the making of surgical instruments?

A. I am not.

45 X Int. Of what material was the chamber or tube of the Reed speculum made at Gemrig's?

A. It was made of brass; and it was also made of German silver.

46 X Int. In your examination-in-chief you were inquired of why the inner or upper end of the Reed speculum was made solid and not open. Now, why do you say the instrument was made with a solid inner end instead of an opening?

A. As I said before, in the first place to allow of its easy withdrawal, and in the second place as an advantage to the manufacturer.

201 47 X Int. How is it that it can be more easily withdrawn, being solid at the point, than if there had been an orifice or opening at the end?

A. I don't understand that question, because there is no orifice at the end here.

48 X Int. I am well aware that there is no orifice there, and whether there is or not has nothing to do with the question. Endeavor to answer the question.

A. A speculum with a slot and slide, as in model Exhibit 11 A, cannot be withdrawn with the same ease as a tubular speculum with no slot, and——

49 X Int. Then am I to understand that the shoulder in the chamber at its upper or inner end is what presents the obstruction to the withdrawal easily of the instrument?

A. That is what prevents the easy withdrawal of the instrument, providing the end is not solid.

50 X Int. If the slot extended clear to the inner end or point of the speculum so as to leave that inner end or point open, would there be any obstruction to the withdrawal of the speculum?

(Objected to as incompetent.)

A. In a certain way; yes, sir.

51 X Int. What is that certain way?

202 A. There is always in a speculum containing a slot and slide some little difficulty in the withdrawal of the instrument that is not found in the ordinary tubular speculum that does not contain a slot and slide.

52 X Int. That is as full an answer, is it, as you wish to give?
A. That is, I believe, an answer to your question.
53 X Int. You may examine the speculum marked 9 A, and state whether or not that is the instrument that you spoke of as the Squire's speculum.
A. Yes, sir; that is the instrument.
54 X Int. Do you know why it bears the name Squire's speculum?
A. From the physician or surgeon who invented it.
55 X Int. Where did that physician or surgeon Squires reside?
A. That I couldn't say, sir.
56 X Int. Did you ever have any acquaintance with him?
A. No, sir.
57 X Int. Your knowledge that the instrument has its name from its inventor is information that you have gathered from mingling with those handling and selling the instrument, I suppose?
A. Yes, sir.
58 X Int. And wholly from that?
A. Yes, sir.
203 59 X Int. The Squire's speculum that you first saw and that you have ever since been acquainted with is in design and structure substantially as this Exhibit 9 A?
A. Yes, sir.
60 X Int. Whereabouts was the first Squire's speculum that you remember of having seen?
A. The first Squire's speculum that I ever saw was in the employ of Aloe, Hernstein & Co.
61 X Int. And you didn't see it until you were in the employ of Aloe, Hernstein & Co.?
A. No, sir; I did not.
62 X Int. I understand you to say that you never saw a Squire's speculum catalogued at all.
A. No, sir; I did not say that.
63 X Int. What did you say?
A. I said I didn't see it catalogued at that time.
64 X Int. How recently or how far back did you see it catalogued?
A. Well, I couldn't say exactly. I have seen it illustrated in the catalogue of Codman & Shurtleff, of Boston. The year that the catalogue was published I can't say, but it is an old one.
65 X Int. By old, you mean how old?
A. I should judge it to be over 8 or 9 years old.
204 66 X Int. That is just from general recollection?
A. Yes, sir. I don't know when they gave that catalogue out.
67 X Int. Have you such a catalogue in your possession or can you get hold of one?
A. I might try.
68 X Q. You don't now have it in — possession?
A. I may have; I don't know.

69 X Int. As a matter of fact Codman & Shurtleff have been the exclusive manufacturers of this Squire's speculum, have they not?

A. Not that I know of; no, sir.

70 X Int. Do you know of any other manufacturers having made the Squire's speculum?

A. No, sir.

71 X Int. Look at the specimane Exhibit 9 A and see whether it does not bear the manufacturers' mark of Codman & Shurtleff.

A. Yes, sir.

72 X Int. As a matter of fact do you know by what house or its salesmen that Squire's speculum has been offered for sale or put upon the market?

A. I don't know that I have ever seen it put on sale by any travelling salesmen, not even Codman & Shurtleff's.

73 X Int. Has it ever been kept in stock in the house with which Aloe has been connected?

A. Yes, sir. That is where I first saw the speculum.

205 74 X Int. But how long it was after you came into the house of Aloe, Hernstein & Co. you are unable to say, I suppose.

A. That I don't know. I have seen the speculum off and on for a great many years.

75 X Int. Have you ever seen it on sale in any house save when it was on sale in the house of Aloe, Hernstein & Co. or Aloe and Company?

A. No, sir.

76 X Int. And it has not for some years been on sale in the house of Aloe, Hernstein & Co. or Aloe & Co., has it?

A. I believe Aloe kept this one when the suit was brought against him, as part of the evidence in this case.

77 X Int. What do you mean when you say Aloe kept this—what do you refer to?

A. Kept this speculum, 9 A.

78 X Int. Do you mean this particular instrument?

A. Yes, sir.

Redirect examination by GEORGE H. KNIGHT, Esq.:

1 Int. Have you any interest in this suit in any manner whatsoever?

A. No, sir.

2 Int. Or any interest in the business of A. S. Aloe & Co. except as an employee?

A. No, sir.

WILLIAM GRADY.

206 ALBERT S. ALOE, defendant, of lawful age, being first duly examined, cautioned, and sworn on his own behalf, deposes and says as follows:

Examined by GEORGE H. KNIGHT, Esq.:

1 Int. Give your name, age, residence, and occupation.

A. Albert S. Aloe; age, 46 years; residence, St. Louis; occupation, manufacturer, dealer, and importer of surgical, optical, mathematical, and electrical instruments.

2 Int. Are you the defendant in this case?

A. I am.

3 Int. How long have you been engaged in your present business?

A. My first business was in 1862.

4 Int. Where?

A. In St. Louis.

5 Int. What were you particularly engaged in then?

A. In the optical branch only.

6 Int. When did you engage in your business as it is at present?

A. In the surgical branch, in 1874; April, 1874?

7 Int. Where?

A. 206 North 4th street, St. Louis.

8 Int. Where have you been engaged in business of this kind since that time?

207 A. Corner of Fourth and Olive street-, St. Louis.

9 Int. Are you familiar with the speculum described in the patent here in suit?

A. Very little, sir. Not until recently. Which speculum do you mean?

10 Int. Exhibit C (Complainant).

A. Very little. Never saw it until recently.

11 Int. What is the construction of this instrument?

A. A conical tube with two handles, a slide coming towards the full end and an incline at the end.

12 Int. State when you first saw or had knowledge of a tubular speculum of the general construction of Exhibit C, having an incline.

A. The first I saw was in a drawing or wood cut in a book I was reading, called Hilton's "Rest and Pain."

(Answer objected to as incompetent.)

13 Int. Where was that book published and by whom?

(Objected to as incompetent.)

A. It was a reprint published by Wm. Wood & Co., New York, 1879?

(Answer objected to as incompetent.)

14 Int. Has that book been introduced in evidence here?

A. It has.

15 Int. State whether or not you have made any effort to secure the original edition of this work.

208 A. I have.

(Question and answer objected to as incompetent.)

16 Int. Please state what efforts you have made in this direction.

(Objected to as incompetent.)

A. When I was in London this summer, where the book was originally published, I tried at every medical-book publisher's and they all stated it was out of print; that they would give me a reprint in this country, which I already had.

(Same objection to answer.)

17 Int. Have you made any efforts in this country to secure the original edition?

A. I have.

(Question and answer objected to as incompetent.)

18 Int. What were the results of your efforts?

A. I have not been able to obtain one; they seem to have entirely disappeared. I went so far as to advertise for one through the St. Louis Book and News Company of this city.

(Question and answer objected to as incompetent.

19 Int. You have said that you have searched for this book. I will ask you where you have searched.

A. In this country?

20 Int. Yes, sir.

209 A. I have inquired from all medical publishers; Wood and Co., N. Y.; they state that they would give a premiuum for one themselves; also at the libraries here in St. Louis; from different surgeons whom I have thought likely to have one.

(Answer objected to as incompetent.)

21 Int. And what was the result of your investigations?

A. I could not obtain one at any price.

(Same objection to answer.)

22 Int. State when next, if ever, you saw an incline in the end of a tubular speculum.

A. The first to my recollection when I was in Europe in 1878 in company with two gentlemen of this city by the names of Thompson and Holton, both merchants of this city. I purchased surgical instruments of different firms and for various purposes in Germany, France, and England. I saw a great many speculums with wooden plugs and an incline similar to that of Exhibit 9 A. I brought one or two or a few of them back to this country. I cannot recollect just how many, and some one in the store, either one of the clerks or Mr. Hernstein who had charge of the medical department at that

210 time, said we had them in stock for years.

(Answer objected to as incompetent and as not responsive to the inquiry.)

23 Int. What was done with those instruments you brought back with you, known as the Squire's instruments?

A. I didn't say they were known as the Squire's instruments. They were somewhat similar to this instrument, which is Exhibit 9 A. I presume they were sold in the course of trade.

(Question objected to as incompetent and answer also.)

24 Int. In what respects, if any, did they differ from Exhibit 9 A?

A. My recollection goes that the plugs were of Turkey boxwood inside and ebony, as shown here.

25 Int. Were there any other differences you can mention?

A. I can't.

(Question and answer objected to as incompetent.)

26 Int. State when you first saw a speculum having a slide similar to that contained in the Plaintiff's Exhibit C.

A. In the year- 1874, 1875, and 1876, so I visit the Eastern markets once or twice a year and have seen speculums such as Exhibit 11 A in different show-cases of manufacturers of surgical in-

211 struments in the cities of New York, Philadelphia, Boston, and Baltimore.

27 Int. When?

A. In the years mentioned; later also.

28 Int. What was the construction of those instruments?

A. As far as my recollection goes, very similar to Exhibit 11 A.

29 Int. Can you mention any difference between those instruments and Exhibit 11 A?

A. I can't, except that they were fully finished—smoothed off. This is a rough sample.

30 Int. What, if anything, was used in connection with Exhibit 11 A?

A. That I can't answer.

31 Int. I understand that you are not a practitioner in the use of these instruments.

A. No, sir; I am not.

32 Int. When did you first hear of Brinkerhoff, the complainant, having a patent on Exhibit C?

(Objected to as incompetent.)

A. Never heard of him, to my knowledge, until after the notice was served on me that I was infringing his patent.

33 Int. And how did you come to engage in the manufacture of the instruments in Exhibits 1, 2, 3, 4, 5, and 6, introduced under stipulation?

212 (Objected to as immaterial.)

A. As before stated, on reading and looking through Hilton's "Rest and Pain" I saw the illustrations of speculums as exhibited on pages 171 and 172. I asked my foreman in the factory if he didn't think that this would be a good saleable instrument, and he said he thought it would. I said, Make up a few samples and we will test them and see what the physicians and surgeons think of them. We made up 8 or ten.

(Objection to answer as incompetent.)

34 Int. Did you make any; and, if so, what was the construction of them? State fully.

A. I made about 8 or 10 of them, can't exactly say, as per Exhibits 4, 5, and 6 of the stipulation; showed them to different physicians and surgeons, and they asked me the benefits. I told them the plug in the end was for a reflector after they drew the slide, so that they could see the portion; that was all I claimed for it. I let some of them have them for trial and they objected on account of the extreme weight on the end.

(Answer objected to as incompetent.)

35 Int. What did you do then?

213 A. We dropped it for a certain time, and then the idea struck me to make a hard rubber plug in the end, extending an inch, or about that, beyond the end of the slide, and fastening the mirror to this rubber plug, making the instrument a great deal lighter and easier to introduce, and the reflective powers that we claimed in the instrument to be still the same.

36 Int. How was it more easily introduced?

A. On account of the tapering end; also the hard rubber not being as cold as a piece of brass in the introduction. To make it easier of application the angle of the mirror is put about 45 degrees for the purpose of good reflection; for no other purpose have I claimed this reflector.

37 Int. Since you started to make the form of instruments shown in Exhibits 1, 2, 3, stipulation, what form have you constantly made?

A. We have adhered strictly to this form 1, 2, and 3.

38 Int. Do you not make any more like 4, 5, and 6?

A. Not to my knowledge.

39 Int. State whether or not you made Exhibits 4, 5, and 6 as an experiment.

A. I did. An experiment and a copy of the illustration in Hilton's "Rest and Pain.

214 40 Int. Did you give them any particular name? I refer now to the instruments as such, and not to any particular one of the exhibits.

A. We called it "Aloe's." I was first going to call it "Hilton's," but, arguing the matter with some of my clerks, they said, You might as well advertise yourself as Hilton.

(Objected to as incompetent.)

41 Int. Have you or have you not abandoned the use of the instruments such as shown in 4, 5, and 6?

A. We have.

42 Int. When did you abandon the use of them?

A. After the decisions or answers I received from different physicians and surgeons of the impracticability of their use.

43 Int. Is or is not your incline in the end of the tube designed to deflect the membrane as the tube is withdrawn? And give any reasons you can in your answer.

A. What do you mean by the word "deflect"?

44 Int. I mean to throw up or away.

A. Throw up the membrane?

45 Int. Yes, sir.

A. No, sir; I never took that into consideration whatever in manufacturing these goods. Not being a surgeon, I did not consider that a point, only as a reflector and for operations as
215 exhibited (note 56, page 172 of Hilton's "Rest and Pain," introduced in evidence). In examination of speculums 1, 2, and 3, stipulation, you will find that the membrane can be caught on the side of the cylinder very easily, as it is entirely of a different construction from Exhibit C. The sides of complainant's cylinder in Exhibit C come straight up with the other incline, perfectly flat in the tube, so that nothing can be caught, which can be readily done in the speculums manufactured by me in 1, 2, and 3.

46 Int. Does or does not your explanation in this respect apply to Exhibits 4, 5, and 6?

A. 4, 5, and 6 is the same thing exactly, but I have given them no thought, as we manufactured very few of them; but on examination you will find the same difficulty exactly. I never claimed a point in that respect.

47 Int. Are you familiar with the instrument Defendant's Exhibit 5 A?

A. Yes, sir; I purchased several of them in the year 1878, about the month of June, in the city of Paris, France, from Luer, surgical-instrument maker——

(Answer objected to as incompetent.)

—and brought them over for sale in this country.

216 48 Int. When did you bring them over?

A. I brought them over on my return. I landed in the month of August, 1878.

(Answer objected to as incompetent.)

49 Int. How long has that particular instrument, Exhibit 5 A, been in your possession?

A. It has been in my possession since that time. I purchased several of them, and they were not very saleable and have not renewed my purchase.

50 Int. Did you ever sell any of the complainant's instruments?

A. I have had inquiries, but have never sold any. When we have had letters inquiring for Brinkerhoff's instruments we have always answered that we never dealt in them.

(Answer objected to as incompetent.)

51 Int. When did you first receive such letters?

A. Since we have been making our own speculums; by parties writing that they would like to have a Brinkerhoff speculum. We have always written that we have never kept them or manufactured them and knew nothing about them.

(Question and answer objected to as incompetent.)

52 Int. Do you mark your instruments; and, if so, in what manner?

217 A. They are stamped in the bottom the same as Exhibits 1, 2, and 3.

53 Int. What is the stamp?

A. Aloe, and the number underneath the name.

54 Int. What does the number indicate?

A. The number of speculums made.

55 Int. State whether or not you have any books in your possession showing illustrations of speculums which were printed prior to 1872, and will you please produce them?

(Objected to.)

A. I have a book or rather catalogue published by L. Nathien, Paris, France, heretofore marked Exhibit 4 A, published in 1864, illustrating the catheter, on page 46, invented by Voillemier, having a slide and incline similar to Exhibit 5 A; also a work written by E. Spillmann and published by J. B. Bailliere *et fils* in Paris in 1872.

(Book referred to last by witness here introduced in evidence and marked Exhibit 15 A.)

56 Int. Please refer to the page in the last exhibit.

A. Page 815, figure 1497, and page 894, figures 1597, another speculum with a slide and reflector.

218 57 Int. You are acquainted with Shepard and *and* Dudley's catalogue and Tieman's catalogue? You have had those in your possession since that date?

A. I had the old catalogue of Shepard and Dudley published previous to 1878, which I intended to bring as evidence, but can't find it, illustrating the Reed speculum as shown here as Exhibit 11 A; have written them for another one and they have not got any.

(Answer objected to as incompetent.)

58 Int. And in reference to Tieman's catalogue?

A. I have one here already introduced as Exhibit 13 A, published in 1872.

59 Int. Those books contain illustrations of speculums?

A. They do.

59½ Int. What difference, if any, is there in the shape of the tube of your instrument and that of Exhibit C?

A. The tube of my instrument is a straight cylinder with a rubber cone at the end. Exhibit C is a tapering instrument, commencing from an opening at the end or rather at the front end and continuing tapering to the extreme point. That is the difference in the tubes.

60 Int. State whether or not you know, of your own knowledge, that a slide was used in this class of instrument prior to 1878.

219 A. Yes, sir; in the Reed speculum; also in some endoscopes for urethral examination.

61 Int. Is there or not any difference in the functions of these slides in the various forms of these instruments?

A. That I can't answer.

62 Int. Do you know of any?

A. I have heard *of* them explained, but to my own practical knowledge I can't give a proper answer.

63 Int. I will again ask you whether there is or not any difference in the functions of the slides in the various forms of these instruments which have been introduced in evidence.

A. The functions are the same, to the best of my knowledge.

Cross-examination waived.

ALBERT S. ALOE.

220 HERMAN SPACKLER recalled by defendant.

Examined by GEORGE H. KNIGHT, Esq.:

1 Int. You have stated, Mr. Spackler, that you placed the incline in the end of the Reed speculum, Defendant's Exhibit 11 A, several years ago for a doctor, and I will ask you now whether you can fix that date definitely, both as to time and the doctor or physician for whom you did the work; and, if so, how do you fix such matters?

(Objected to as incompetent.)

A. I will not say that it was just a Reed speculum, but a speculum similar to a Reed speculum, and I looked over my books last night, of old times, and I found there that I fixed on a certain date, before 1876, for Dr. Hodgen, a mirror in a speculum.

(Answer objected to as incompetent and as not responsive to the question.)

2 Int. Can you produce the book?

A. Yes, sir; it is here. It is my old-time book, from the first time I started business, and shows just as we put little things down that were not paid for right away.

3 Int. What is the entry in that book referring to this work?

(Objected to as incompetent.)

221 A. Witness reads entry: "Dr. Hodgen, May 23, speculum, paid, $2.00."

4 Int. Does that entry refer to work on the Reed speculum you have already described?

(Objected to as incompetent.)

A. I believe it could not be anything else.

(Answer also objected to for same reason.)

5 Int. What year was that?

A. That I can't tell. You will see that I am no book-keeper whatever; but it was before 1876, as this book runs to 1876, and then I got another book, as that book was full. I am in no way a book-keeper.

6 Int. Were the charges made in that book as you did the work?
A. Yes, sir.
7 Int. One after the other?
A. No; I believe in the whole book Dr. Hodgen is not a dozen times in it.
8 Int. I don't ask whether all work is charged in the book, but were the entries charged according to date?
A. No, sir; whenever I find—Hodgen generally paid cash, but when he sent somebody else I put it in the book and some one else came in and paid for it.
9 Int. When did you cease making entries in that book?
A. This book runs up to 1876, and then I have another that runs up to the time out.
10 Int. What years are marked in the book, both before and after this entry?

(Objected to as incompetent.)

222 A. It begins in the year 1866, when I started business.
11 Int. What is the last year marked before you made that entry?
A. 1872.
12 Int. What is the first year after that entry?
A. Undoubtedly 1874.
13 Int. Was that entry made between those dates?
A. Undoubtedly; but it was undoubtedly made before 1876, as you will see I am not a book-keeper at all.

(Defendant offers in evidence Spackler's book, which is marked Exhibit 16 A.)
(Complainant objects to admission of book.)

Cross-examination by J. C. LEE, Esq.:

1 X Int. Why do you say, Mr. Spackler, that the entry referred to must be before 1876?
A. Because from that time I have another book at home showing further entries.
2 X Int. Do you absolutely know that you made no entries in this book after making your entries in that book?
A. No, sir.
3 X Int. Didn't you keep this book at your shop as the other book?
A. Always.
4 X Int. This seems to be simply a memorandum showing that for some work in the nature of a mirror for a speculum for
223 Dr. Hodgen was paid in same year and on the 23rd day of May?
A. No, sir; it was not paid that date.
5 X Int. Is that the memorandum here, "paid"?
A. Yes, sir.
6 X Int. Was that memorandum made on that date?
A. Not on that day. I will tell you the way I had that.

7 X Int. The question is do you know that the payment was not made on May 23rd.

A. I know it was paid on the same day it was made. I would not have put it in the book.

8 X Int. The only entry you have made seems to be, Dr. Hodgen, May 23, speculum mirror, paid $2.00.

A. That means that I made for Dr. Hodgen that work and the charge was $2.00 and when he paid it I marked it paid. You will find the same way in the whole book.

9 X Int. Is that in your handwriting?

A. Yes, sir.

10 X Int. All of it?

A. Yes, sir; the whole book.

11 X Int. You don't pretend that this entry was made before any of the entries that follow it in the book were made?

A. No, sir.

12 X Int. Wherever you found a vacant place you made an entry?

224 A. Yes, sir.

13 X Int. And there is nothing to show here excepting May 23, the time it was done?

A. Yes, sir.

14 X Int. Nothing in the way of year, one way or the other; but you say you used another book after 1876?

A. Yes, sir.

15 X Int. Now, as I understand you, after you commenced making memoranda in the other book you still had this book at the shop?

A. Yes, sir; always.

16 X Int. And you say you didn't make any memorandum in this book after you commenced to make memoranda in the other book?

A. I believe not.

17 X Int. Can you swear to that?

A. No, sir; because it is an impossibility. If you will compare this book with others you will find that it goes forward in succession.

(Examiner here marks the page of the book on which the Dr. Hodgen entry of the book is to be found "Page 60, E. Smith, special examiner.")

HERMAN SPACKLER.

225 SAMUEL KNIGHT, of lawful age, being produced, examined, cautioned, and sworn as a witness on behalf of the defendant, deposes and says as follows:

Examined by GEORGE H. KNIGHT, Esq.:

1 Int. Please give us your full name, age, residence, and profession.

A. Samuel Knight; St. Louis; 59 years of age; patent solicitor and expert.

2 Int. How long have you been engaged in your present occupation?

A. Something over 20 years; I don't remember exactly.

3 Int. State what experience you have had during that time tending to qualify you to testify as an expert—a mechanical expert.

A. I have critically examined a very large number of patents as to their mechanical construction and devices and have prepared a large number of specifications relative to mechanical patents in that time.

4 Int. State what knowledge you have of machinery.

A. I have what I consider a very fair knowledge of machinery in general.

5 Int. What experience have you had in that line?

A. Well, in that time I have handled a great deal of machinery for the purpose of an accurate description of it, and, of course,
226 critically as to the novelty to be found in it.

6 Int. State what experience you have had tending to qualify you to testify as an expert in patent cases.

A. Since early youth I have been more or less engaged in mechanical manipulation and mechanical studies, and, as I have said, since the time I have been engaged in my present business I have had to carefully and critically examine mechanical devices.

7 Int. Have you or not been frequently called to testify in patent litigation as an expert?

A. Yes, sir; I have frequently testified as an expert in such matters.

8 Int. State whether you have read and understand the patent issued to A. W. Brinkerhoff March 2, 1880, No. 224,991, here in suit.

A. I have read the specifications to that patent and understand it.

9 Int. You may give your understanding of the instrument there shown and described.

(Objected to as incompetent.)

A. The body of the instrument consists of a conical tube closed at the end and circular in transverse sections. In one side is a slot having parallel sides and occupied by a slide extending from end to end of the tube. The smaller end of the tube is closed and
227 has a rounded form, of which the end of the slide partakes. At the inner side of the tube end is an incline. At the larger end of the tube is an out-turned lip or flange. The body or tube and the slides are each supplied with a handle by which they may be manipulated.

10 Int. Look at Defendant's Exhibit 5 A and state what relation it bears, in your opinion, to the patent sued upon.

A. I find in this a tube with an outside bead at the outer end, in the same position as the lip or flange of the Brinkerhoff device. The tube has a slot extending from end to end with parallel sides;

has an incline at the inner part of the rounded end, and has a slide adapted to fill the slot. The slide has upon it a handle, so that I find in this instrument these features in common with the Brinkerhoff device.

11 Int. What further do you find in the Brinkerhoff device that is not found in Exhibit 5 A?

A. The Brinkerhoff device has a conical form which is not found in Exhibit 5 A, and a tube or body has a handle, "D," which I don't find in the instrument.

12 Int. By conical form do you mean the tapering shape of the tube?

A. Yes, sir; I mean the tapering shape of the tube.

228 13 Int. As a patent expert, do you understand that the difference you have mentioned in the Brinkerhoff device over Exhibit 5 A constitute any part of Brinkerhoff's alleged invention?

A. I don't understand that they do unless the closing words of the patent might be understood to limit the device to the conical or tapering form, the claim (2) having the words "substantially as and for the purposes herein set forth," and claim (3) having the words "substantially as described and for the purposes herein set forth." If those terminating clauses of the claim may be held to apply to the tapering form, it would make a difference between the Brinkerhoff device and Exhibit 5 A.

14 Int. Look at Exhibits 1, 2, 3, 4, 5, and 6 of the stipulation, and state whether they show the tapering form found in the Brinkerhoff device.

A. No, sir; they do not.

15 Int. State what, if any, features you find in Exhibits 1, 2, 3, 4, 5, and 6 of the stipulation that are not found in the Defendant's Exhibit 5 A and are found in the Brinkerhoff device.

A. I don't see any, unless the out-turned flange at the outer end of the tube may be considered to be so, but I regard the bead

229 in the same position upon Exhibit 5 A as substantially the same thing, as it would, no doubt, fulfill the same office.

16 Int. Look at Exhibit 9 A, and state what relation it bears to the Brinkerhoff device.

A. In this I find the tube, which is not conical in form, has a slot in the side with parallel sides to it, an incline at the inner end, and a slide, which may be drawn back to expose more or less of the slot. It is not conical in form, but the tube has the same diameter throughout, from the out-turned lip or flange to the rounded end.

17 Int. State what elements, if any, you find in the three claims of the Brinkerhoff patent that are not found in Exhibit 9 A.

A. The first claim is for "a slide in the side of a speculum extending through its whole length, and used substantially as herein described." In the Exhibit 9 A the slide extends from end to end and may be used to expose a part of the slot as the slide in the Brinkerhoff device. The slot does not, however, extend the whole length in the tube in this exhibit, 9 A, but the slide, which is made the first feature of the claim (in the Brinkerhoff patent), extends the

whole length of the slot and the whole length of the instru-
230 ment, except for the rounded end extending beyond the tubular part in Exhibit 9 A. In the second claim the elements are the incline in the front end of the chamber, the slotted tube, and slide. I find all these in Exhibit 9 A. The third claim is for the slotted tube, the closed end, and the incline extending from the bottom of the chamber forwardly and upwardly to the slide. All these elements I find in Exhibit 9 A.

18 Int. Do you find any element in the claims of the Brinkerhoff patent that are not also found in Exhibit 9 A?

(Objected to as leading.)

A. No, sir; I don't.

(Answer also objected to.

19 Int. Do you or not find any element in the three claims of the Brinkerhoff patent that are not also found in Exhibit 5 A?

(Objected to as leading.)

A. No, sir; I don't find any elements of the three claims of the Brinkerhoff patent that are not present in Exhibit 5 A.

20 Int. Look at Defendant's Exhibit 11 A and state what relation it bears to the Brinkerhoff patent.

A. I find that this Exhibit 11 A has the elements of the first claim, and that it has all the elements of the second and third claims excepting the incline.

231 21 Int. I will now ask you to place Exhibit 2 A in Exhibit 11 A, with the stem on the lower wall of Exhibit 11 A, and state what relation those two used in connection bear to the Brinkerhoff patent.

A. The two combined contain all the elements of the Brinkerhoff patent, in my opinion, the incline, of course, in Exhibit- 11 A and 2 A not being a fixture, but being movable and being placed in the exact position of an incline and used effectually for the same purpose, which I understand to be the easing of the folds of the mucous membrane, or excrescences of the same, or tumor over the closed end in the removal of the instrument.

22 Int. I will ask you to take Exhibit- 1 A and 2 A and, placing the latter into the former with the stem along the lower wall, *and* state what bearing these have to the Brinkerhoff patent.

A. In these exhibits, taken together, I find the elements of the Brinkerhoff claims, except as to the slide. The slot, however, has not parallel sides, but is wider at the outer end. The shape of the tube is tapering, like that of the Brinkerhoff device; so that I find the slotted tube and the deflector or incline, the slide being absent.

232 23 Int. What do you understand to be the office of the incline shown in the Brinkerhoff patent?

A. He described it to be to "prevent impaction of pile tumors and large glands or surplus membrane into the end of the chamber

and thereby enable the operator to withdraw the instrument with safety and ease," by which I understand him to mean that it raises without injury any projecting part, so that the closed end passes it without injury.

24 Int. Look at the Defendant's Exhibit 11 A, which has a straight wall extending down from the inner end of the slot, and state whether or not that, in your opinion, would serve to deflect the membrane as the instrument is withdrawn.

A. Yes, sir; I think it would.

25 Int. Look at Defendant's Exhibits 1, 2, 3, 4, 5, and 6, per stipulation, and state whether there would be any substantial difference, in your opinion, in the operation of the incline shown in those exhibits and the straight wall of Exhibit 11 A as to deflecting the membrane.

A. In my opinion they both would deflect the membrane to the same point, but that in Exhibits 1, 2, 3, 4, 5, and 6 it would be done with greater ease.

233 26 Int. Do you not find sharp corners between the wall of the tube and incline in Nos. 1, 2, 3, 4, 5, and 6?

A. Yes, sir; I do find two corners which might possibly do any injury that would be done by this part in Exhibit 11 A.

27 Int. Then what substantial difference is there between the operation of the two in regard to injuring the membrane as the instrument is withdrawn?

A. The part below these corners might raise a projection if it were salient enough to come into contact with it and make the deflection more easy. I would say, though, in a careful examination of those Exhibits 1, 2, 3, 4, 5, and 6 I find an inside corner on each side of the incline under which the projection of the mucous membrane might catch and cause greater injury than any corner that I find in the same place in Exhibit 11 A; and, in comparing this with the Exhibit C, I find that those corners have not apparently the injurious form found in Exhibits 1, 2, 3, 4, 5, and 6, per stipulation, for the width of the slot at that point in Exhibit C almost equals in diameter the tube at that point, so that the edges do not form inwardly projecting lips, leaving a recess upon each side which might cause the injury.

234 28 Int. I now wish to refer to my last question. "Then what substantial difference is there between the operation of the two in regard to injuring the membrane as the instrument is withdrawn?"

A. I will say that in the use of the instrument Exhibit 11 A there would be less liability to injury at the corners between the slot and deflector and a somewhat greater friction against the projection at other parts than would be found in the Exhibits 1, 2, 3, 4, 5, and 6, excepting at the extreme edge of the corners before alluded to. I think the extreme edge in the two are substantially alike in any effect they would have on the mucous membrane, for the corner substantially is a rectangular one in both, taken on a longitudinal plane made through the middle of the slot and at right angles to the width of the slot.

29 Int. State whether, in your opinion as an expert, the incline on the end of the Brinkerhoff speculum performs the function attributed to it in the patent any different when used in connection with the slide than when used by itself.

A. No, sir; the slide and incline in the described operation are not used simultaneously and the function of the one has no bearing on that of the other.

235 Cross-examination by J. C. LEE, Esq.:

1 X Int. Are you a member of the firm of Knight Brothers, patent solicitors and attorneys, St. Louis?

A. Yes, sir; I am.

2 X Int. That firm is engaged as attorneys and solicitors for the defendant in this action, is it not?

A. Mr. George H. Knight, of that firm, is engaged as attorney in this case. We have no soliciting business in relation to it properly, and he is attending solely to the attorney's business in the matter.

3 X Int. He is the attorney who just completed your examination-in-chief, is he not?

A. Yes, sir.

4 X Int. And a member of your firm?

A. Yes, sir.

5 X Int. And your brother?

A. My nephew.

6 X Int. Are you a physician and surgeon?

A. No, sir.

7 X Int. Either?

A. No, sir.

8 X Int. Have you ever practiced surgery?

A. No, sir.

9 X Int. Did you ever treat a case of rectal disease?

A. No, sir.

10 X Int. Did you ever see one treated?

(Defendant at this point interposes an objection to all of the foregoing questions as irrelevant and immaterial.)

236 —. No, sir.

11 X Int. Did you ever see any of the instruments to which your attention has been called in your examination-in-chief to-day used in either discovering or treating rectal diseases?

(Objected to as irrelevant and immaterial.)

A. No, sir.

12 X Int. Do you know whether the implement known as Exhibit 5 A, catheter, is or is not adapted to the discovery and treatment of rectal diseases?

A. I don't know anything about that; have not any surgical knowledge in the matter.

13 X Int. Do you know it by any other sort of knowledge?

A. I could form a conclusion, but I can hardly say I know it.

14 X Int. Don't you know that the catheter, Exhibit 5 A, is used

and adapted only to the purpose of injecting or withdrawing fluids through the urethra?

A. No, sir; I don't know that; I suspect it is not.

15 X Int. What do you suspect it is used for?

A. I should suspect it was a very good instrument for withdrawing gravel from the urethra or bladder.

16 X Int. And you would be surprised if it was used for either injecting or withdrawing fluids from the body?

(Objected to as incompetent.)

237 A. No, sir; I should not be at all surprised; that is, I presume, its most frequent use.

17 X Int. It is your supposition that it is adapted to and used for the purpose of extracting gravel from the bladder?

(Objected to as incompetent.)

A. I can hardly say it amounts to that in my ignorance of surgery and knowledge of mechanics; it seems to me it might do it very well; but I am not a surgeon.

18 X Int. An anatomist?

A. I can hardly be said to be an anatomist; I know a good deal of the human body and its interior parts.

19 X Int. The speculums 1, 2, 3, 4, 5, and 6 and 11 A and 9 A you suppose are all, as well as Exhibit C, designed and intended in treating rectal diseases, don't you?

A. Yes; I do.

20 X Int. In speaking about the liability of the integuments in the rectum intruding into the speculum, have you considered whether that intrusion would be enhanced or increased by the presence of tumors or other unnatural growth in the rectum?

A. Yes, sir; I have.

21 X Int. And do you mean in your answers to cover them by the phrase "mucous membrane"?

A. No, sir; I used other expressions, I think.

238 22 X Int. When you speak in your testimony-in-chief about the possibility of the withdrawal of a speculum with a perpendicular face at the inner end of it do you take into account the fact that in many cases there is an enlargement of the integuments of the rectum, such as hemorrhoids, piles, &c.?

(Objected to as irrelevant and immaterial.)

A. Yes; I took that into account.

23 X Int. Do you wish to say that it is your opinion that intrusions into the speculum of that kind would pass as easily over a perpendicular face of that kind as over a face with a 45-degree incline?

A. No, sir; I don't think they would.

24 X Int. Would they not pass not only more easily to the operator, but, if tender, much less painful to the patient over the 45-degree incline?

(Objected to as irrelevant and immaterial.)

A. I don't think it would make much difference to the operator. I think it would to the patient if there was any greater friction produced on the projection—the hemorrhoid, tumor, or whatever it might be, or the folds of the mucous membrane where they were tender.

25 X Int. You say that you found the same elements in Exhibit 5 A that you did in Exhibits 1, 2, 3, 4, 5, and 6. Is that correct?

A. Yes, sir; as I defined it.

239 26 X Int. Do you say that you also found the same and all of the elements of Exhibit C in that Exhibit 5 A?

A. No, sir. I didn't say that.

27 X Int. What did you say on that point?

A. I say that Exhibit C has a handle upon the tube which is not found in Exhibit 5 A, and that the general conical form of the tube of Exhibit C is not found in Exhibit 5 A, and I say that the slot, the slide, and the incline of Exhibit C are found in Exhibit 5 A.

28 X Int. Do you say that the use to which Exhibit 5 A can and is designed to be put is the same as the use to which Exhibit C is designed to be or can be put?

(Objected to as irrelevant and immaterial.)

A. I suppose the instruments are intended for different purposes. I am not able to say that no examination could be made and no treatment effected of the parts of the rectum by the use of the instrument, Exhibit 5 A.

29 X Int. Do you understand that in the use of 5 A — can or expects to have any illumination of or view of the diseased parts?

(Objected to as irrelevant and immaterial.)

A. I don't feel that I am competent to have an opinion on that point. I see that there is an opening made all through the instrument, from the upper to the rounded end, through which

240 an instrument might be introduced or perhaps sight be had of the parts by partly withdrawing the slide.

30 X Int. In your testimony-in-chief you spoke about the joint use of either a Reed speculum, Exhibit 11 A, or a speculum, Exhibit 1 A, in conjunction with the mounted mirror 2 A. Now, what office do you understand the mirror would fill or perform in conjunction with the discovery or treatment of rectal diseases with either of those two speculums?

(Objected to as irrelevant and incompetent.)

A. I understand the first use of the mirror would be to show the inner side of any diseased part, as a tumor, and that upon withdrawing the instrument if anything were required to ease the tumor over the inner end of the instrument the mirror would be used for that purpose, so that I should suppose its use to be twofold.

31 X Int. And you would think it could serve two purposes—that of illumination and that of easing the patient in the withdrawal?

A. Yes; and perhaps another quite as important as the first—that

of showing the part of the projection that could not be seen otherwise.

32 X Int. That object would fall under the general designation "illumination," would it not?

241 A. Perhaps. I didn't think of it in that way.

Redirect examination by GEORGE H. KNIGHT, Esq.:

1 Int. Would it require anything more than ordinary mechanical skill, in your opinion, to make the upturned end of Exhibit 5 A straight?

A. No, sir. I think it would take a very small amount of mechanical skill to straighten that, and would not require any invention.

2 Int. What, then, would be the difference between it and the Exhibits 1, 2, 3, 4, 5, and 6, except as to the length and the diameter of the parts?

A. It would be substantially the same excepting as to matters of proportion, length, and diameter.

SAM'L KNIGHT.

CHARLES E. MICHEL recalled for the defendant.

Examined by GEORGE H. KNIGHT, Esq.:

1 Int. Are you now able, Doctor, to produce one of the instruments about which you testified yesterday? And, if so, please

242 tell us what instrument it is and state when you used such an instrument in this country.

A. I have the instrument in my hand. It was made in 1858 and I used it in this country in 1860.

2 Int. By what name is it known in the profession?

A. That I can't tell you.

3 Int. What is the construction of it?

A. It is a speculum with three hinged parts, which may be arranged into a tubular form with a conical-shape- plunger, which may be withdrawn and one of the leaves arranged to slide in and out. The opening may be made larger or smaller at will.

4 Int. Were such instruments common at the time you mention?

A. They were.

5 Int. Is that the instrument shown on page 60, part III, Exhibit 13 A, figures 196 A and 196 B and 196 C?

A. It is.

(Instrument mentioned by witness offered in evidence and marked Defendant's Exhibit 17 A.)

6 Int. For what purpose did you use the instrument, Exhibit 17 A?

A. As a vaginal endoscope.

Cross-examination waived.

CHAS. E. MICHEL, M. D.

243 JULIUS ROBERTSON, of lawful age, being produced, sworn, and examined as a witness on the part of the defendant, deposes and says:

Examined by AUGUSTUS BINSWANGER, Esq.:

1 Int. Give your name, age, residence, and occupation.

A. Julius Robertson. I am a lawyer and notary.

2 Int. Age.

A. 40.

3 Int. Residence.

A. St. Louis.

4 Int. Are you conversant with the French language?

A. I am.

5 Int. How long have you been familiar with the French language?

A. I was born and raised in a French-speaking country—Louisiana—and passed three years in France.

6 Int. Look at page 46 of Exhibit 4 A and state whether or not you are competent to make a translation of the French language there used.

A. I believe that I can make a correct translation of the matter.

7 Int. How soon can you make such translation?

A. I can make it in 15 minutes, I suppose.

244 8 Int. Can you make the translation now and have the examiner take it down?

A. I can do it, but I could use better language by writing it out.

9 Int. Will you proceed to translate it?

A. It is headed "New Evacuation Probe, with Double Courses, by Boillemiere." This probe is composed of a large gutter bent to coincide with a bend of the canal of the urethra. This gutter, open in the direction of concavity, is transformed in a complete canal by another gutter which recurving to a third of the circumference of the canal, which it fills and of which the concavity is lower or inferior. It goes by grooves at first and offers multiple openings to adapt it to the lower bend. The whole of these two parts form a voluminous man probe, with three rings, and at the lower part or convex of that complex probe and even in the thickness of the lower wall exists a conduit which is disposed in the external portion to receive the tube of a syringe, and at the other extremity, called vesicle, exists a double series of holes which permits entrance or arrival in the bladder of the liquids pushed by the syringe. Liquids which shake up the urine and put in suspension the solid matter, which can be introduced in the gutter which one makes, open at will in whatever quantity is desired in drawing back.

JULIUS ROBERTSON.

Cross-examination waived.

245 H. H. MUDD recalled as a witness for defendant.

Examined by AUGUSTUS BINSWANGER, Esq.:

1 Int. Doctor, in your examination yesterday you testified to th

use of a speculum with an incline many years ago, and you were asked if you could find such speculum to produce it before the examiner. Have you found said speculum and have you it now here in your possession?

A. Yes, sir.

2 Int. How long has that speculum been in your possession, to your best knowledge?

A. I can only fix the date approximately. We moved to our office on 14th street 16 years ago. I think it was about 4 or 5 years after that that I bought this speculum. It was an old speculum when we moved to our office on Jefferson avenue, which was 6 years ago last August. It had lost its mirror at that time and had been partially destroyed.

3 Int. How long in years can you state that that speculum has been in your possession?

A. I testified the other day, and I am not far from correct in saying 12 years.

4 Int. Will you look at that speculum and state in what condition the incline is to-day and what condition it was in at that time?

246 A. It is the same as at that time, excepting it was a polished surface at that time and served as a reflector.

5 Int. You spoke of a looking-glass being placed in that speculum. Where was that placed and how?

A. It was on the side opposite the slot or opening and extended from the base to the incline.

6 Int. Is there a slide there in which it fitted?

A. Yes, sir.

(Speculum here offered in evidence, marked Exhibit 18 A.)

7 Int. Could that slide be turned in and out?

A. Yes, sir.

8 Int. For what purpose was that instrument used, if you know?

A. For rectal examination.

9 Int. By you in such examinations?

A. Yes, sir.

10 Int. In this city?

A. Yes, sir.

Cross-examination by J. C. SMITH, Esq.:

1 X Int. From whom did you obtain that speculum, Doctor?

A. I don't remember definitely, but from Leslie, probably.

2 X Int. Have you any means of determining what time

247 you made the purchase of that instrument?

A. It was, perhaps, the earliest so-called rectal speculum that I purchased. I had been using a Simms vaginal speculum as a rectal speculum before that. I think this was the first rectal speculum that I used.

3 X Int. Did you use it exclusively in your practice?

A. I used it from time to time, as occasion required.

4 X Int. About how often did you treat patients?

A. As long as I have had it—perhaps between 10 and 12 years.

5 X Int. How many years before since you treated a patient with it?

A. I don't think I have used that speculum within a year; I may have used it within the past year.

6 X Int. Did you abandon its use in favor of any other form?

A. Yes, sir; the purpose for which I used that I have used since since a cylindrical speculum, and for general exploration Simms'.

7 X Int. Did you find it objectionable and so abandon its use?

A. No, sir, except that it didn't show the parts as well as others.

8 X Int. By what accident did the looking-glass become broken?

A. By slipping it in and out, I suppose.

248 9 X Int. Do you remember when that occurred?

A. No, sir.

10 X Int. Since you ceased using it where has it been kept?

A. In my office.

11 X Int. Had you any mark by which this could be distinguished as the instrument you bought 11 years ago?

A. I think it is the only instrument I have seen in use. I have had it in my possession ever since.

12 X Int. There can be no mistake about its being the one you referred to?

A. No, sir.

13 X Int. How was that slide you speak of operated?

A. It was removed by the fingers—catching the end of the glass. The notches are still there into which it fitted.

14 X Int. I see no groove provided for movement of the slide.

A. That was not necessary. The slot was sufficient to hold it in position. There is no disposition to tilting forward of the loose end.

15 X Int. What has become of the slide?

A. Broken, sir.

16 X Int. Of what material was it made?

A. Glass.

17 X Int. Do you know when and under what circumstances it was broken?

A. It was, I think, over 5 years ago. This instrument was

249 catalogued at the time of Dr. Hodgen's death, near 6 years ago, and it was then an old instrument.

18 X Int. Then you have not used it for five years?

A. Yes, sir; I have used it within the past 12 months, I think. I don't use it often. There are two other gentlemen in the office, and sometimes they have the other instruments out and I use this.

19 X Int. That is the only implement of the kind that you ever saw?

A. No, sir; I have seen others of that kind, but this is the only one of the kind that I have seen in use in the city.

20 X Int. I asked you to fix upon a time when you purchased this instrument. Have you any means by which you can tell us when you became its purchaser except by general recollection?

A. I keep an expense account, and possibly I might find it itemized as a matter of expense.

21 X Int. You have not looked at that?

A. No, sir.

21½ X Int. Then you rely upon your general recollection as to the time you obtained the instrument?

A. Upon that and the general fact of the work in that line and of the movements we made in our office which fixes *some* some things in my mind. This was obtained before we left the
250 office on 14th Str., which was 6 years ago last August. Dr. Hodgen died the next spring, and the instruments were catalogued at that time, and the instrument was imperfect at that time. I had used it, I think, for several years with the mirror in position.

22 X Int. It may be 9, 10, or 12 years ago?

A. Yes, sir.

Redirect examination:

1 Int. When you say it may be 9, 10, or 12 years ago, do you mean that it is 9 years or less or more?

A. My impression is that it is near 12. I can't fix the date definitely.

2 Int. And had you seen such an instrument in the possession of any one else prior to your purchasing the same?

A. No, sir.

3 Int. The mirror that was used in the slide was a glass mirror?

A. Yes, sir.

HENRY H. MUDD.

251 Counsel for the respective parties stipulate and agree that the complainant- may have six weeks from the 18th day of January, 1888, within which to take rebuttal testimony.

ELENEIOUS SMITH,
Special Examiner.

Counsul stipulate that all exhibits in the cause may remain in the custody of the special examiner and be loaned to either party, on request, for the purpose of being used in the taking of testimony.

ELENEIOUS SMITH,
Special Examiner.

252 I certify that the foregoing depositions of John P. Bryson, Augustus C. Bernays, Henry H. Mudd, Herman Spackler, Warren B. Outten, Andrew Leslie, Charles E. Michel, William Grady, Albert S. Aloe, Samuel Knight, and Julius Robertson were taken at the times and place aforesaid, and that it was then and there agreed by the parties to said cause who were respectively represented by counsel at the taking of said depositions, the said complainant by J. C. Lee and J. C. Smith, Esquires, and the said defendant by Augustus Binswanger and George H. Knight, Esquires, that the depositions of all of said witnesses might be taken in shorthand and the notes subsequently transcribed and signed by the respective witnesses and filed. I further certify that the deposi-

tions of said witnesses were taken in short-hand and subscribed by said witnesses after the same had been transcribed from the short-hand notes of testimony.

I further certify that each of said witnesses was by me duly sworn and cautioned, and that the foregoing is a true transcript of the testimony of said witnesses, and that all exhibits identified by said witnesses have been properly marked by me and identified in their respective depositions.

253 In testimony whereof I have hereunto set my hand at office, in the city of St. Louis, in said district, this 9th day of February, 1888.

ELENEIOUS SMITH,
Special Examiner.

254 And afterwards, to wit, on the 24th day of December, A. D. 1888, the following further proceedings were had and appear of record in said cause, to wit:

MILFORD H. BRINKERHOFF and WILLIE C. BRINKERHOFF, Executors of Alexander W. Brinkerhoff, Deceased, Complainants,
vs.
ALBERT S. ALOE, Defendant. } 2594.

This cause came on to be heard at this term upon the pleadings, exhibits, and proofs, and was argued by counsel and submitted.

And the court having considered the same and being now fully advised in the premises, it is ordered, adjudged, and decreed as follows, to wit:

That complainants' said bill of complaint be, and the same is now hereby, dismissed with costs, to be taxed against said complainants.

And afterwards, to wit, on the 27th day of December, A. D. 1888, the following further proceedings were had and appear of record in said cause, to wit:

MILFORD H. BRINKERHOFF and WILLIE C. BRINKERHOFF, Executors of Alexander W. Brinkerhoff, Deceased, Complainants,
vs.
ALBERT S. ALOE, Defendant. } 2594.

On application of complainants it is ordered that an appeal from the decree of this court to the Supreme Court of the United States be allowed on complainants giving bond in the sum of five hundred dollars, to be approved by this court or one of the judges thereof.

255 And afterwards, to wit, on the 5th day of January, A. D. 1889, the following further proceedings were had and appear of record in said cause, to wit:

MILFORD H. BRINKERHOFF and WILLIE C. BRINKERHOFF, Executors of Alexander W. Brinkerhoff, Deceased, Complainants,
vs.
ALBERT S. ALOE, Defendant. } 2594.

Now come the complainants, by their solicitor, and present to the court their appeal bond in the sum of five hundred ($500) dollars, which is by the court approved and ordered to be filed and made part of the record herein, and also present a citation herein citing and admonishing the defendant to be and appear at a Supreme Court of the United States to be held at the city of Washington on the second Monday of October next.

And thereupon it is ordered that the clerk of this court make out and certify to the Supreme Court of the United States a full and complete transcript of the record and proceedings herein.

Said appeal bond is in words and figures following, to wit:

256 Know all men by these presents that we, Milford H. Brinkerhoff, Willie C. Brinkerhoff, and A. Billhardt, are held and firmly bound unto Albert S. Aloe in the full and just sum of five hundred dollars, to be paid to the said Albert S. Aloe, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this second day of January, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at the September term, A. D. 1888, of the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, in a suit depending in said court between Milford H. Brinkerhoff and Willie C. Brinkerhoff, executors of Alexander W. Brinkerhoff, deceased, complainants, and Albert S. Aloe, defendant, a decree was rendered against the said complainants, and the said complainants having obtained an appeal of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Albert S. Aloe, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said complainants, Milford H. Brinkerhoff and Willie C. Brinkerhoff, executors of Alexander W. Brinkerhoff, deceased, shall prosecute said appeal to effect and answer all damages and costs if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

MILFORD H. BRINKERHOFF. [SEAL.]
WILLIE C. BRINKERHOFF. [SEAL.]
A. BILLHARDT. [SEAL.]

Approved by—
AMOS. M. THAYER, *Dist. Judge.*

17—85

Service of citation is hereby acknowledged this 28th day of May, 1889.

GEO. H. KNIGHT,
Att'y for Def't.

[Endorsed:] No. 2594. United States circuit court, eastern division of the eastern judicial district of Missouri. Brinkerhoff *et al.* *vs.* A. S. Aloe. Bond, $500.00. —— ——, principal; —— ——, sureties. Filed 5th day of Jan'y, 1889. A. P. Selby, clerk.

257 In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

ALEXANDER W. BRINKERHOFF, Complainant,
vs.
ALBERT S. ALOE, Defendant.
} In Equity. No. 2594.

Lee, Brown & Lee, solicitors for complainant; Geo. H. Knight and A. Binswanger, solicitors for defendant.

Opinion of the Court, December 24, 1888.

THAYER, *District Judge:*

This is a bill to restrain the infringement of letters patent No. 224,991, granted to Alexander W. Brinkerhoff under date of March 2nd, 1880, for an improvement in "rectal specula."

The patentee in his specification thus describes his invention:

"My speculum is made of metal and plated in the usual manner to secure a bright interior and smooth surface. In shape it is conical and has one side slotted through its entire length of chamber. Into such slot is closely fitted a movable slide, having upon it- rear end a handle for actuating it. On the side of the tube opposite the slide is another handle by which to hold the tube when in use. Around the large end of the tube is a flange or lip, * * * and in the forward end of the chamber is an incline, made necessary in specula having closed ends * * * to prevent the impaction of pile tumors, enlarged glands, or surplus membrane in the end of the chamber, and thereby enable the operator to withdraw the instrument with safety and ease."

258 Of the nature of his invention the patentee says: "My invention consists in the use of a slide extending through the length of one side of the tube, and an incline inside of the forward or small end of the chamber, extending from the bottom of the chamber upward and forward to the under side of the slide when in place to prevent injury to the membrane while withdrawing the instrument," &c.

The claims made in the specification are as follows:

"1. A slide in the side of a speculum extending through its whole length, and used substantially as herein described.

"2. The incline in the front end of the chamber, in combina-

tion with the tube, slot, and slide, substantially as and for the purposes herein set forth.

"3. In cylindrical tubular specula having a slotted side and closed end to prevent the entrance of fæces, the incline in the front end of the chamber extending upward from the bottom and forward to under side of slide, substantially as described, and for the purposes herein set forth."

1st. It is clear that the first claim of this patent, covering "a slide in the side of a speculum extending through its whole length," cannot be sustained. Indeed it is not seriously contended by complainant's counsel that the device covered by that claim is novel. I shall not go into the details of the evidence, therefore, on this branch of the case, but will content myself with the general statement that the testimony of Dr. Warren B. Outen, Dr. Chas. Bernays, and Dr. Charles E. Michel, as well as the testimony of Wm. Grady and Herman Speckler, satisfies me that rectal speculums closed at one end, having a slot in the side extending the full length of the chamber, and fitted with a slide had been used by the medical fraternity in this country before the date of the alleged invention. Whilst it is true
259 that defendant has not produced any of the speculums that were so in use and has only produced a model of one made in his own shop since this suit was filed, known as the "Reed speculum," yet I consider this fact not sufficient in itself to overcome the positive statements of intelligent and entirely disinterested witnesses, who had occasion to know the fact whereof they speak, that speculums with slotted sides fitted with slides were in use and to some extent were on sale in this country prior to the date of the alleged invention, in July, 1878.

The Reed instrument and possibly all the instruments of which the witnesses above named have spoken had glass slides instead of metal, but that fact is not important, as the material of which the slide is composed is not claimed as an essential feature of the device; but even if the foregoing view is erroneous I am furthermore of the opinion that the first claim of the patent was anticipated by "Segala's trivalve vaginal speculum," which was produced on the hearing and was shown to have been in use in this country since 1860; also by the "catheter," which was produced on the trial and shown to have been on sale in this country since 1874. (Defendant's Exhibit 17*a* and 5*a*.)

The use for which both of the instruments last referred to were designed are analagous to that in which complainant employs his instrument.

Both instruments are tubular. Each has a slot in the side extending the full length of the chamber, fitted with a metal slide, which is intended to be wholly or partially withdrawn (the same as the slide in the rectal speculum) when the operator has occasion to examine or treat the particular organs for the treatment of which these instruments were constructed.

In view of the slides shown in Segala's vaginal speculum and in the catheter and the use made of the same it must be held that there

is nothing novel in the slide in complainant's patent. He
260 has in this particular matter merely appropriated a device long known and used in surgical instruments, fitted for the examination of certain interior membranes or cavities of the body, for the improvement of another instrument adapted to the treatment of other interior membranes.

Hilton's rectal speculum, an instrument said to have been in use in England as early as 1870, also clearly anticipates the first claim of complainant's patent, and probably the second and third claims. If Hilton's speculum, as contended, was described in a printed publication in England as early as 1876, that fact also invalidates the first claim of the patent under consideration, and most likely the 2nd and 3rd claims.

The original printed publication relied upon, said to have been published in London as early as 1876, was not produced at the hearing before the master, but in lieu thereof a volume entitled "Rest & Pain," published in New York in 1879, which purports to be a reprint of the earlier English publication, was produced.

Some testimony was offered to the effect that application had been made to the English publishers and to other book-sellers in London and in this country for a copy of the original publication, and that they reported the work to be out of print. All of the testimony, however, tending to show that a book entitled "Rest & Pain" was published in London in 1876, and that the work reprinted in this country in 1879 is an accurate copy thereof, is of the nature of hearsay, and, as objection was duly taken to the testimony when it was produced before the master and was insisted upon at the trial, the objection must be sustained, no matter how persuasive the inference may be that there was a foreign publication which described Hilton's speculum.

The latter instrument is accordingly ignored as an anticipation of complainant's invention.

2nd. The 3rd claim of the patent is a claim for the "incline"
261 in cylindrical tubular specula having a slotted side and closed end.

The particular device attempted to be covered by this claim was anticipated, in my opinion, by a rectal speculum produced by Dr. Mudd (Defendant's Exhibit 18a) and shown to the satisfaction of the court, to have been purchased at an instrument store, and to have been in use in this country before the date of complainant's invention.

The instrument in question is tubular; it is conical in form, has a slotted side, a closed end, and, what is of more importance, an incline at the closed end extending from the bottom of the chamber upward and forward to the end of the slot. It is true that the angle made by the incline with the axis of the tube in the latter instrument approaches more nearly to a right angle than the incline in complainant's speculum; nevertheless there is a pronounced "incline," and, moreover, Dr. Mudd testifies that one purpose of the "incline" is to protect the mucous membrane from injury when the speculum is withdrawn. It should be further observed that com-

plainant's specification does not make the angle at which the incline is set in his speculum an essential feature of the device. As described in his specification, the utility of the incline consists in preventing the "impaction of pile tumors," &c., and in enabling the operator to withdraw the instrument without injury to the membranes. This is precisely the function of the incline in the speculum produced by Dr. Mudd, and apparently it was set at an angle which effectually accomplished that purpose. At all events no complaint appears to have been made against that speculum on the ground that the incline failed to accomplish the purpose had in view.

The Squire's speculum (Defendant's Exhibit 9*a*) also shows an incline in the forward or closed end in all respects like that in complainant's instrument, but the testimony in the case leaves it somewhat doubtful whether the "incline" in Squire's speculum was placed therein shortly before or shortly after complainant claims to have invented it. For that reason the patent is not affected by the evidence offered by defendant in relation to the Squire's instrument.

262

3rd. In view of what has been said it appears that plaintiff's right to relief depends on the second claim for the "incline * * * in combination with the tube, slot, and slide."

This claim is attacked on two grounds: 1st, that the combination, as a whole, was anticipated by Dr. Hodgen when he caused an incline in the form of a mirror to be set permanently in the forward end of the old "Reed speculum," about the year 1876, and, 2nd, that the combination is devoid of invention and patentable novelty.

I shall concede that the evidence as to what Dr. Hodgen caused to be done with the Reed speculum 12 or 13 years since is, under the circumstances, not of that certain and convincing character which ought to be required to overturn the claims of a duly issued patent.

The second objection to the claim, however, is more formidable. The Reed speculum before alluded to shows "the tube, slot, and slide" combined in a manner that does not differ essentially from the form in which the same elements are combined in complainant's combination.

To these three elements the patentee added a fourth—the "incline in the front end of the chamber;" but the "incline," as before stated, was itself an old device which had been used in speculums such as was produced by Dr. Mudd.

Furthermore, it was used in the old instruments for the same purpose that complainant professes to have invented it—that is to say, to avoid injuring protruding membranes when the speculum was withdrawn.

263

Even if complainant had been the first to use the incline in tubular speculums having closed ends the device was a very obvious one, scarcely rising to the dignity of an invention, considering the function it performed, as is well illustrated by the account which the patentee gives of the manner in which the idea was conceived. He states that he first constructed his speculum, as shown in the specification, with a tube, slot, and slide, but

without an incline. When he made the first trial of the instrument he discovered the risk of injuring such membranes as happened to protrude through the slot, as others had discovered who made the Mudd instrument; thereupon he employed a jeweler to solder a small piece of metal in the forward end of the chamber, so as to form an incline, and subsequently amended his specification by adding the 3rd claim, which is substantially a claim for the incline as an independent device.

But, regardless of the obvious nature of the improvement made by adding the incline, the court is of the opinion that the combination so formed was not patentable, because no new result or effect was produced by the united action of the old elements.

To sustain a patent on a combination of old devices it is well settled that a new result must be obtained which is due to the joint and co-operating action of all the old elements. Either this must be accomplished or a new machine of distinct character and function must be constructed.

Pickering *vs.* McCullough, 104 U. S., 310.
Hailes *vs.* Van Wormer, 20 Wall., 353.
Tack Co. *vs.* Man'f'g Co., 9 Bissell, 258.
Wringing Mach. Co. *vs.* Young, 14 Blatch., 46.

If several old devices are so put together as to produce even a better machine or instrument than was formerly in use, but each of the old devices does what it had formerly done in the instrument or machine from which it was borrowed and in the old way, without uniting with other old devices to perform any joint function, it seems that the combination is not patentable.

264 Hailes *vs.* Van Wormer, *supra.*
Beckendorf *vs.* Faber, 92 U. S., 347.

In the present case the incline, when placed in combination with the "tube, slot, and slide," acted precisely as it did when placed in the forward end of a slotted tube not provided with a slide. Its action was in no sense modified by the new relation in which it was placed, nor did it, in unison with the other elements of the combination, produce a distinctively new result.

In accordance with these views the bill is dismissed.

265 UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern division of the eastern judicial district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record, pleadings, and proceedings in case No. 2594, of Milford H. Brinkerhoff and Willie C. Brinkerhoff, executors of Alexander. W. Brinkerhoff, deceased, complainants, against Albert S. Aloe, defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in the eastern division of said district, this 31st day of May, in the year of our Lord eighteen hundred and eighty-nine.

Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri.

A. P. SELBY,
Clerk of said Court.

Endorsed on cover: Case No. 13,632. E. Missouri C. C. U. S. No. 85. Milford H. Brinkerhoff and Willie C. Brinkerhoff, executors of Alexander W. Brinkerhoff, deceased, appellants, *vs.* Albert S. Aloe. Filed September 13, 1889.

146 U.S. 573

Supreme Court of the United States.
FILED.
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CLERK.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1892.

TERM No. 85.

MILFORD H. BRINKERHOFF AND WILLIE C. BRINKERHOFF, EXECUTORS OF ALEXANDER W. BRINKERHOFF, DECEASED, APPELLANTS.

vs.

ALBERT S. ALOE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

BRIEF FOR APPELLANTS.

PRESS OF H. I. ROTHROCK

Supreme Court of the United States.

OCTOBER TERM, 1892.

TERM No. 85.

BRINKERHOFF, *vs.* ALOE. } In Equity.

This action is for an infringement of complainants patent No. 224,991, dated March 2, 1880.

The exhibits and evidence show clearly that the defendant has manufactured and sold specula that contain all the devices mentioned in complainant's patent. In fact it is clear that the implement manufactured by defendant is a duplicate of the one illustrated in said patent.

The contention therefore is limited to the questions, first, do the claims of said patent or either of them cover the implement? and second, is said patent valid in law?

Obviously there can be no doubt regarding the first question, for even if the first of the three claims has been anticipated or is otherwise untenable, the second and third remain practically unimpaired.

The second claim is for the combination of the

inclined wall, the tube, slot and slide, while the third is substantially for the instrument as a whole.

Either one of these last mentioned claims is sufficient for the purpose. But we do not admit that the first claim is anticipated. The testimony discloses a glass speculum provided with a glass slide.

It will be observed that said glass slide does not extend through the whole length of the tube. Furthermore a glass slide would be a dangerous feature in such an instrument and unworthy of consideration.

Still we rest our case mainly upon the second and third claims.

Recurring to the second question we are met by the following state of facts:

The plaintiff prepared and sent to the Patent Office an informal application for patent on the 17th of July, 1878. The next day he made a trial of the device and the result was unsatisfactory. He then took the instrument to a silversmith and had an inclined wall arranged in the inner end which obviated the difficulty he had encountered and rendered the speculum perfect for the use intended. This statement is made by the plaintiff fully in answer to interrogatory 13, and is confirmed by the testimony of witness Fuchs.

On the 18th day of July therefore 1878, the plaintiff's invention was perfected and fully illustrated by a working implement.

The informal application was subsequently amended and such steps taken that the application was ready for official action on the 28th of June, 1879, and the patent issued March 2, 1880.

The patent is assailed as all successful inventions have always been by information such as ghouls

obtain from cemetaries, for a moment's glance at the patented references cited is sufficient to show they cut no figure whatever in the case.

Chief among the inventions arrayed against the novelty of the invention shown and claimed is a speculum made Dr. Squier of Newport, Rhode Island which shows the inclined wall.

A witness for defendant (Leslie) testifies that he believes he saw and handled that instrument ten years ago, but brings no vouchers. If that statement is reliable then the Squier's instrument had been invented and was for sale in the market a few months before the Brinkerhoff speculum was perfected. That it is not the fact however is plainly shown in Dr. Squier's deposition. He states that he invented the instrument late in 1877, Interrogatory 7, and that the inclined wall constituted no portion of it. That wall he says was added about two years subsequent, and by some person nnknown.

The inclined wall therefore did not appear in the Squier's instrument until late in the year 1879, a year and a half after Dr. Brinkerhoff invented it.

Now Leslie whose business life has been nearly spent in handling similar instruments and who appears to have been familiar with the art states positively that the inclined wall first appeared in a a speculum in the Squier's invention. Int. 31. We can safely dismiss the Squier's speculum and Mr. Leslie's unaided memory regarding the time he first handled it with an inclined wall.

That time might have been eight or nine years ago, but it could not by any possibility have been ten.

The only speculum besides Dr. Squiers that can be treated seriously is an old broken one intro-

duced by Dr. Mudd. This is a very imperfect affair. It has an inner wall slightly inclined and was at one time provided with a glass cover that could be lifted out of the side slot. It has no slide and no grooves provided for any.

Relying wholly upon his memory and unaided by any voucher or memorandum whatever, Dr. Mudd states that he thinks he bought this instrument twelve years ago, of Mr. Leslie, although on cross examination, Int. 22. he admits it may not have been more than nine years since he made the purchase.

We smbmit that even in case this old instrument were a duplicate of ours and Dr. Mudd's impression regarding it were to be deemed correct, still inasmuch as it was never patented and no description thereof appears in any printed publication in this or any foreign country, it could not be held an anticipation of the Brinkerhoff patent. It manifestly must be classed among abandoned experiments. This one only has ever been seen. It is one of those rusty contrivances of unsuccessful experimentors mentioned in Adams vs. Jones, 1st. Fisher 527–Exparte, Jno. C. Birdsell, 1st. O. G. 465–Woodward vs. Dinsmore, 4th Fisher 163, and Wood vs. Cleveland, Rolling Mill, 4th Fisher 550.

But the inclined wall in this old exhibit is not of such a character as that in the Brinkerhoff instrument. Is has a different angle and even that angle was intended not to provide the contents with safe and easy means of exit but for the reception of a mirror placed therein for inspection purposes.

The witness Dr. Bernays' testimony relates in great part to things he witnessed in Europe.

Those matters cannot be considered in the case.

The mere existence of a device in a foreign country unless patented or described in a printed publication is not a fact having any significance or that can be recognized at all in connection with our patent laws. See Carr vs. Davids 3 O. G. 440.

But Dr. Bernays nowere states that he ever saw a duplicate of the Brinkerhoff speculum either in Europe or elsewhere, and admits that the inclined wall is not shown in the engraving of the instrument he saw in Guy's Hospital in London.

The attempt made to combat the patent by means of a catheter is not worthy of any sober response. It might serve as the subject matter of an article in the funny corner of some merry publication. It may also tend to enlarge the number of books containing things mankind does not know, but in a grave debate its class can only be selected among the absurd.

It is true that one gentleman Mr. Knight has given an opinion that the combination of devices would be about the same in both instruments provided the catheter had been made on a longitudinal line instead of being curved.

Courts now pay very little attention to expert testimony in cases when the invention in controversy is not intricate and is well illustrated by models. Their opinion may aid a court materially regarding elaborate drawings and complicated machinery, but for a simple instrument like a speculum it is little less than an affront to offer such testimony to an intelligent court however learned and reliable the expert may be.

Whatever experience the witness Dr. Bryson may have had in 1874 is a matter of indifference in this litigation because he admits the speculum he em-

ployed was a tube and mirror. The tube was first introduced and then the mirror was thrust into the tube.

The witness Spackler gives his general recollection regarding a speculum he handed in 1876 or 1878, but inasmuch as no exhibit is made of this instrument his testimony is of little or no value. See Cochran vs. Waterman, Judge Cranch, M. S. U. S. Patent Office.

He represents it as a slotted tube in which he placed a mirror on an angle of 45 degrees.

That appears to be the only one of the kind he ever saw. Its fate is unknown and it legitimately falls within the class of abandoned experiments. Cross Int. 70.

But Mr. Spackler is by no means positive that he saw that old speculum as early as 1876 or 1878. An entry in a book dated May 23d, is his only voucher, but the year is in doubt. See Cross Ex. on second recall. Int. 16 and 17.

The witness Outten gives his general recollections of an instrument he saw when attending medical lectures a long time ago. He believes the cylinder was rounded inside and that the front end of the wall was vertical or oblique. Cross Int. 23.

Manifestly such testimony in the absence of an exhibit is of no value whatever when used for invalidating a patent. But see answers to Cross Int. 32 and 33 in which witness admits that the first time he ever saw a speculum with a slide and inclined wall might have been within the past three or four years.

The testimony of Dr. Michel is of very small value. He states that specula provided with an incline were in use in Europe in 1859, and subse-

quently in this country. He recites his experiences with such instrument and promises to exhibit one. This he attempts to do upon his recall, but instead of showing an implement like the Brinkerhoff specula exhibits, 17 A. vaginal implement made in sections, and hinged together.

Bnt Dr. Michel evidently has a very defective memory. In answer to Cross Int. 33 he swore positively that the speculum he used in 1860 consisted of a single piece while his exhibit has three.

This deposition furnishes an excellent commentary on the decision of Judge Cranch–Cochran vs. Waterman above cited. Showing the folly of relying on human memory regarding models or drawings that are not exhibited.

Avoirdupois weight can never attach to such evidence unless the number of ounces to the pound be increased indefinitely. But no amount of it can cast a shadow on the integrity of a patent, secured without fraud and after an exhaustive examination of all the patents and printed publications of all nations such as the law recognizes as the only obstacles to the granting of the franchise.

It is contended by the defense and decided by the court below that the Brinkerhoff speculum does not contain a patentable combination, but a mere aggregation of old elements, and hence there is no invention as set forth in the claims and specification of the Brinkerhoff patent. While we do not concede that only old elements enter into the combination specified in the second claim, yet for the purposes of this part of the argument, and for this purpose only we will treat that objection as if the elements of the combination were, in fact, all old.

It is no easy matter always to readily distinguish

between that which is mere aggregation, and a patentable combination of old elements. Definitions have been furnished by courts of a patentable combination, and many illustrations are furnished in decisions of courts showing at least, in those particular cases, where the boundary line is between the two.

In Pickering *vs.* McCullough, 104 U. S., 310, the second clause of the syllabus is "A combination of old elements is not patentable unless they all so enter into it as that each qualifies every other. It must either form a new machine of distinct character and function, or produce a result which is not an aggregate of seperate contributions, but is due to the joint and co-operative action of all the elements."

On page 318 of the same case in the opinion which is by Mr. Justice Mathews, it is said "in a patentable combination of old elements all the constituents must so enter into it as that each qualifies every other; it must form either a new machine of a distinct character and function, or produce a result of the joint and co-operating action of all the elements, and which is not a mere adding together of separate contributions, otherwise it is only a mechanical juxtaposition and not a vital union."

While this definition of a patentable combination is good so far as it goes, it would leave in doubt the question whether by "joint and co-operating action" is meant *simultaneous* action. That question is answered negatively in an older case, Forbush *vs.* Cook, 2d of Fisher, 669. In that case Judge Curtiss, afterward an Associate Justice of the Supreme Bench, instructed a jury in this language: "To make a valid claim for a combination, it is not necessary that the several elementary parts of the

combination should act *simultaneously*. If those elementary parts are so arranged that the successive action of each contributes to produce some one practical result, which result when attained is a product of the simultaneous or successive action of all the elementary parts viewed as one entire whole, a valid claim for thus combining those elementary parts may be made." Many other explanatory and instructive statements of the distinction between aggregation and patentable combination might be made.

In the latter part of Sec. III of "Curtis's Law of Patents," is this: "The essence of a combination is this, namely: Although each of the several elements performs a distinct function, yet as a whole their joint or successive action contributes to one practical result." "Also where the invention being an improvement in the power loom for weaving figured fabrics consisted of bringing into use in the machine three elementary, each of which performed a certain office in producing one practical result, it was held that this was a new combination." We may add also that it is immaterial whether the actuating force of such a machine or instrument is mere mechanical force guided and controlled by machinery, or whether it is actuated directly by the skilled hand of man.

Bearing in mind these general rules and principles, let us proceed to a careful consideration of the use to which the speculum is put, its object or purpose, and the result or results to be obtained.

Brinkerhoff, beginning with line 20 of his specification, says: "The nature of my invention consists in the use of a slide extending through the length of one side of the tube, and an incline inside of the

forward or small end of the chamber extending from the bottom of the chamber upward, and forward to the underside of the slide when in place, to prevent injury to the membrance while withdrawing the instrument, and to prevent the impaction of pile-tumors and enlarged glands in its end, and thereby preventiug its withdrawal only with difficulty and danger." This is quite a full statement, not only of the general result aimed at, but also of the severral successive results in the procedure to obtain that general result.

In his specification beginning with line 58, he says: "My invention differs from others in this, that while their sides are open from end to end when the examination is made in the rectum, and the abnormal parts enter through the entire length at once, the lower end often becoming entirely closed first, and cutting of all view of the upper part, mine only admits such parts through the opening as made by slowly drawing the slide downward even to the anal orifice, if desired, the adjustable slide enabling me to keep out all desired below its inner end, and admit what is to be examined without any obstruction to the view."

These extracts from the specification are somewhat inartificially drawn and somewhat complicated and involved. As shown by his own testimony they were drafted by Brinkerhoff himself. We venture to state in our own language the general result sought for as well as some of the results along the line of procedure toward the attainment of that general result.

First, comprehensively, the general result sought is the discovery and successful treatment of rectal diseases. By his speculum Brinkerhoff sought

more effectually than by any other machine to discover and diagnose the disease to most effectually treat the disease. In the process of the work of discovery he makes the first use of his specula. Its size and shape adapt it to the necessary insertion easily and as nearly painlessly as possible. Its bright interior finish gives it an illuminating power. its rounded and closed upper end while allowing an easy and approximately painless insertion, also excludes all foreign matter. By reason of the slot in the tube extending the whole length of the tube (not necessarily the whole length of the instrument) and by reason of the slide extending the whole length of the slot, all the surroundings integument not farther up than the upper end of the slot may, by the careful withdrawal of the slide, by the very little distances at a time, be fully inspected and diagnosed from the inner end of the slot to the outer orifice of the instrument. By reason of the slot and the slide being of uniform width throughout their whole length, the slide is not displaced from its retaining grooves until the upper end of the slide has reached the lower end of the instrument. The width of the slide and slot being equal to about one-third or one-fourth of the entire circumference of the speculum three or four insertions and withdrawals of the speculum will be necessary to a complete inspection of the entire circumference of the rectum. In each of these withdrawals the incline at the inner end of the speculum performs an important part. When the inspection or diagnosis is complete, then comes treatment which is almost universally by local application to the diseased part. To effect this the speculum is used just as in making inspection and diagnosis, for the slide is

gradually drawn outward and the local application is made beginning at the inner end of the tube, and following outward along that portion of the integument made accessible by the withdrawal of the slide. If the entire circumference of the integument is to be treated there is to be the same number of insertions and withdrawals of the speculum, the same number of withdrawals by successive stages of of the slide, before the grand or general result of discovery and trratment has been attained, and in every withdrawal of the speculum the incline is brought into actual active use, so that while the slide and the slot are simultaneously acting co-operating, their action is either accompanied with or followed closely by the operation of the incline. The combining therefore of a tube with a slot, the whole length of the tube having parallel sides with a slide of the full length of the slot operating in a fixed groove in the slot, and of an incline at the inner end of the tube over which the intruding normal and abnormal integuments and growth may pass with comparative ease and entire safety, is a combination, certainly not a mere aggregation, and a combination with most useful agencies in effecting the double general result, and in securing in the procedure to that general result. of several minor results.

Respectfully submitted,

J. C. SMITH,
Attorney for Appellants.

gradually drawn outward and the local application is made beginning at the inner end of the tube, and following outward along that portion of the integument made accessible by the withdrawal of the slide. If the entire circumference of the integument is to be treated there is to be the same number of insertions and withdrawals of the speculum, the same number of withdrawals by successive stages of of the slide, before the grand or general result of discovery and treatment has been attained, and in every withdrawal of the speculum the incline is brought into actual active use, so that while the slide and the slot are simultaneously acting co-operating, their action is either accompanied with or followed closely by the operation of the incline. The combining therefore of a tube with a slot, the whole length of the tube having parallel sides with a slide of the full length of the slot operating in a fixed groove in the slot, and of an incline at the inner end of the tube over which the intruding normal and abnormal integuments and growth may pass with comparative ease and entire safety, is a combination, certainly not a mere aggregation, and a combination with most useful agencies in effecting the double general result, and in securing in the procedure to that general result, of several minor results.

Respectfully submitted.

J. C. SMITH,
Attorney for Appellants.

146 U.S. 15

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CLERK.

United States Supreme Court

OCTOBER TERM, 1892.

MILFORD H. BRINKERHOFF ET AL., EXECUTORS,
COMPLAINANTS AND APPELLANTS,

vs.

ALBERT S. ALOE,
RESPONDENT AND APPELLEE.

No. 85.

BRIEF AND ARGUMENT FOR APPELLEE.

GEORGE H. KNIGHT,
Solicitor for Appellee

Nixon-Jones Printing Co., 213 Pine Street, St. Louis, Mo.

United States Supreme Court

OCTOBER TERM, 1882.

MILFORD H. BRINKERHOFF ET AL., EXECUTORS,
COMPLAINANTS AND APPELLANTS,

vs.

ALBERT S. ALOE,
RESPONDENT AND APPELLEE.

No. 85.

BRIEF AND ARGUMENT FOR APPELLEE.

If it please the court: —

This suit was brought in the Eastern District and Division of Missouri, for the alleged infringement of U. S. Letters Patent No. 224,991, issued March 2, 1880, to A. W. Brinkerhoff, for alleged improvements in Rectal Speculums. The case was heard by his Honor, Judge Thayer, and the bill dismissed for want of Equity, whereupon complainants appealed.

STATEMENT OF THE CASE.

In January, 1878, A. W. Brinkerhoff, the patentee, commenced the treatment of rectal diseases, traveling from place to place in Northeastern Ohio (Rec., p. 12). The last of March or first of April, according to his testimony, he conceived the idea of using a tube having a slide to be drawn out, after the tube was inserted, to expose the parts. On the 20th day of July, 1878, he filed in the Patent Office an application for a patent on the tube having a slide. The day he sent these papers to Washington (Rec., p. 13), he received his speculum, the tube with a slide, and tried it the next day at Delaware, Ohio, and, to use his words, he "found that the tumor would expand in the chamber after the operation and would not come out through the slot. I then took it, the speculum, to a silversmith and had the incline put in."

On August 2d, 1879, he sent (Rec., p. 25) the first description of his alleged invention, as patented, to the Patent Office, denouncing earlier constructions, and making charges against the examiner, both of which he was required to withdraw (see Examiner's letter, Rec. p. 26). On the 21st of October, 1879, he appointed attorneys to take charge of this application (Rec., p. 26). On the 2nd day of December, 1879, and again on the 17th day of January, 1880, he revoked the power of attorney he had given, and finally, on the 2nd day of March, 1880, the patent issued, with three claims, one for the slide, one for the incline, and one for the slide and incline combined. His Honor, Judge Thayer, in his opinion, comments upon the manner in which the incline was added (Rec., p. 133.)

The complainants have not offered one word of testimony,

tending to show that this instrument has been generally, or at all used by other physicians, and it seems to be one of those patented things lacking sufficient utility to ever come into general use.

We will show that the incline in the end of the tube was old; we will show that the slide was old; we will show that the two combined were old in a catheter, an instrument very similar to a speculum, and we believe we will also show, to the satisfaction of the court, that the two were combined in a speculum, all before the alleged invention of Brinkerhoff.

The defenses are: —

1st. That the defendant has not infringed this patent.

2nd. That the patent is anticipated and null and void, for the reason that the patentee was not the first to make an instrument embodying the features, such as are shown, described and claimed in said patent.

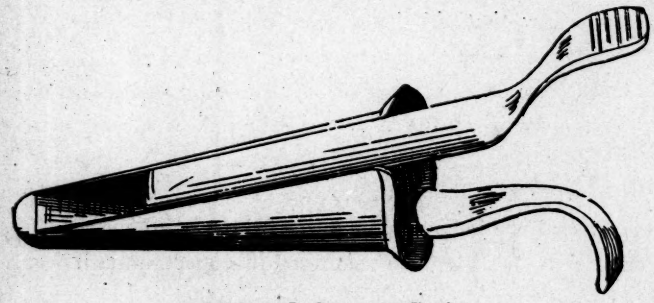
3d. That the patent is null and void for the reason that the claims cover a mere aggregation of old and well-known elements which do not, because of being united, produce any new and useful result.

4th. That there was no novelty in the patentee combining the elements or features, shown, described and claimed in said patent, and that all of said features were old and well known at the date of the alleged invention of said Brinkerhoff.

We will take these up *seriatim*.

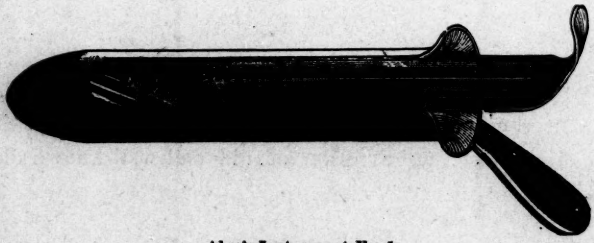
1. On the question of infringement but a few words will be said.

The patentee makes a special point of the slide extending the full length of the tube — see the patent and Rec., p. 18.



Brinkerhoff's Instrument Ex. C.

We here give a cut of the complainant's and one of the defendant's instruments, from which it will appear that the defendant's slide does not extend the entire length of the tube, as does the complainant's.



Aloe's Instrument Ex. 1.

On this question witness, Doctor BERNAYS, says: (Rec., p. 54).

"65 Int. Does the slide in exhibits 1, 2, 3, 4, 5 and 6 extend as "near to the end of the tube as in Exhibit C. A. No, sir."

Under this question of infringement, it is proper to note that the defendant never got his idea of the speculum made by him from complainant, but from the book entitled "Hilton's Rest and Pain," defendant's Exhibit 3a.

He says: (Rec., p. 107).

"9 Int. Are you familiar with the speculum described in the patent here in suit? A. Very little, sir. Not until recently. Which speculum do you mean?

10 Int. Exhibit C, (complainant). A. Very little. Never saw it until recently.

11 Int. What is the construction of this instrument? A. A conical tube with two handles, a slide coming towards the full end and an incline at the end.

12 Int. State when you first saw or had knowledge of a tubular speculum of the general construction of Exhibit C, having an incline? A. The first I saw was in a drawing, or wood cut, in a book I was reading, called Hilton's "Rest and Pain."*

13 Int. Where was that book published and by whom?* A. It was a reprint published by Wm. Wood & Co., New York, 1879.*

14 Int. Has that book been introdued in evidence here? A. It has.

15 Int. State whether or not you have made any effort to secure the origiual edition of this work?* A. I have.*

16 Int. Please state what efforts you have made in this direction.* A. When I was in London this summer, where the book was originally published, I tried at every medical book publisher's and they all stated it was out of print. That they would give me a reprint in this country, which I already had.*

17 Int. Have you made any effort in this country to secure the original edition?* A. I have.*

18 Int. What were the results of your efforts?* A. I have not been able to obtain one; they seem to have entirely disappeared. I went so far as to advertise for one through the St. Louis Book and News Company, of this city.*

19 Int. You have said that you have searched for this book. I will ask you where you have searched? A. In this country?

20 Int. Yes, sir. A. I have inquired from all medical publishers, Wood & Co , New York. They stated that they would give a premium for one themselves. Also at the libraries here in St. Louis; from different surgeons whom I have thought likely to have one.*

* NOTE. All quoted questions and answers objected to are noted with a *, and to save unnecessary printing, the objections are omitted.

21 Int. And what was the result of your investigations? A. I could not obtain one at any price.*

* * * * * * * * * * * * *

32 Int. When did you first hear of Brinkerhoff, the complainant, having a patent on Exhibit C?* A. Never heard of him to my knowledge, until after the notice was served on me that I was infringing his patent.

33 Int. And how did you come to engage in the manufacture of the instruments in exhibits 1, 2, 3, 4, 5 and 6, introduced under stipulation?* A. As before stated, on reading and looking through Hilton's "Rest and Pain" I saw the illustrations of speculums as exhibited on pages 171 and 172. I asked my foreman in the factory if he did not think that this would be a good salable instrument and he said he thought it would. I said: Make up a few samples and we will test them and see what the physicians and surgeons think of them. We made up eight or ten.*

34 Int. Did you make any; and if so, what was the construction of them? State fully. A. I made about eight or ten of them; can't exactly say, as per exhibits 4, 5 and 6 of the stipulation; showed them to different physicians and surgeons and they ask me the benefits. I told them the plug in the end was for a reflector after they drew the slide so that they could see the portion. That was all I claimed for it. I let some of them have them for trial and they objected on account of the extreme weight on the end.*

35 Int. What did you then do? A. We dropped it for a certain time, and then the idea struck me to make a hard rubber plug in the end, extending an inch or about that beyond the end of the slide and fastening the mirror to this rubber plug, making the instrument a great deal lighter and easier to introduce, and the reflective powers that we claimed in the instrument to be still the same.

36 Int. How was it more easily introduced? A. On account of the tapering end. Also the hard rubber not being as cold as a piece of brass in the introduction. To make it easier of application the angle of the mirror is put about 45 degrees for the purpose of good reflection; for no other purpose have I claimed this reflector."

It is also proper to state in this connection that exhibits 4, 5 and 6 were never made by defendant except as an experiment, so that

exhibits 1, 2 and 3 should be considered as the only ones made by defendant, so far as this suit is concerned.

On this question Mr. ALOE says:—

"37 Int. Since you started to make the form of instrument shown in Exhibits 1, 2, 3, stipulation, what form have you constantly made? A. We have adhered strictly to this form of 1, 2 and 3.

38 Int. Do you not make any more like 4, 5 and 6? A. Not to my knowledge.

39 Int. State whether or not you made exhibits 4, 5 and 6 as an experiment? A. I did. An experiment and a copy of the illustration in Hilton's "Rest and Pain."

40 Int. Did you give them any particular name? I refer now to the instruments as such, and not to any particular one of the exhibits. A. We called it "Aloe's." I was first going to call it "Hilton's," but arguing the matter with some of my clerks they said you might as well advertise yourself as Hilton. *

41 Int. Have you or have you not abandoned the use of the instruments, such as shown in 4, 5 and 6? A. We have.

42 Int. When did you abandon the use of them? A. After the decisions or answers I received from different physicians and surgeons of the impracticability of their use."

With this, we will leave the question of infringment and take up the next defense.

2. That the complainant's patent is anticipated, we think there can be no doubt.

And first as to the Speculum or Catheter. Defendant's Exhibit 5a. We give a cut of it.

Defendant's Exhibit 5a.

This Speculum consists of a slotted tube, provided with a slide and having an incline at its inner end. It is at least 25 years old; a cut and description of it is given in the publication, Defendant's Exhibit 4a, dated 1864; and witnesses testify to its use in this country as early as 1872.

This instrument when in the size and shape of Exhibit 5a, may be more particularly intended for the injection and withdrawal of fluids, but a mere change in length and diameter would make it as suitable in every way for an examination of the rectum as either the complainant's or defendant's. But one or more of the noted physicians, whose depositions have been taken in this case, insist on its being suitable for an examination of the rectum, even when of the dimensions shown in Exhibit 5a.

In testifying, concerning this, DR. MICHEL said (Rec., p. 97): —

"59 x Int. And the use of the catheter is? A. Catheter is a generic term; can be used in any tube.
60 x Int. To withdraw? A. You can withdraw or not.
61 x Int. Or inject a fluid? A. Yes, sir.
62 x Int. Is not that the extent of the office and purpose of the catheter to inject and withdraw fluids? A. I have used them as dilators. It can be used for other purposes."

The defendant, Aloe, testified (Rec., p. 111): —

"47 Int. Are you familiar with the instrument, defendant's Exhibit 5a? A. Yes, sir; I purchased several of them in the year 1878, about the month of June, in the city of Paris, France, from Luer, surgical instrument maker.* And brought them over for sale to this country.
48 Int. When did you bring them over? A. I brought them over on my return; I landed in the month of August, 1878.*
49 Int. How long has that particular instrument (Exhibit 5a) been in your possession? A. It has been in my possession since that time; I purchased several of them and they were not very saleable and have not renewed my purchase."

DR. BERNAYS testified (Rec., p. 51):—

"31 Int. Do you know whether they were used in any form of speculum; the inclines?* A. Oh, yes; they were used in all instruments that were liable to get full of urine and focal matter.*

32 Int. How early? A. I don't know; I suppose back in the 50's, 40's or 30's. Get an old catalogue and you will see that, because it is a simple matter, a simple mechanical device.

33 Int. Were they used in connection with a slide? A. Yes, sir; in catheters.

34 Int. Look at the instrument I hand you and state what it is. A. That is a urethral speculum, with a slide for a male or female urethra.

35 Int. Has it an incline at the end? A. It has an incline at the end.

36 Int. When did you first see one of these in this country? A. I have seen it in an old catalogue in this and foreign countries.*

37 Int. Can you produce one of the old catalogues? A. Yes, sir; here is one.

(Catalogue offered in evidence and marked defendant's Exhibit 4a).

38 Int. Whose catalogue is it? A. Mathieu; published in 1864 in Paris.

39 Int. What page of that catalogue does the illustration of this instrument appear on? A. Page 46 of Exhibit 4a, Mathieu's catalogue.

(Instrument last referred to is offered in evidence by defendant as Exhibit 5a.)

40 Int. Now state when you first saw an instrument like Exhibit 5a in use in this country? A. I saw so many of them; my father had a half dozen of them.

41 Int. What year? A. *Well, say between 1870 and 1872, that I would be sure of, as I was often helping my father in his office.*

42 Int. Were they in general use? A. I suppose so, from the fact that he had and used a number of them in the urethra.

43 Int. Please state what resemblance there is between Exhibit C and defendant's Exhibit 5a, so far as relates to the incline in the end of the tube and slot in the tube and the slide fitting in the slot? A. *If you were to hand me this instrument, Exhibit C, and ask me what I thought it was, I would say that it is almost an exact copy*

*of and direct imitation of the Hilton speculum. Plainer I cannot make it. There may be a trivial difference in some respect; but it is so trivial I cannot recognize it now.**

44 Int. Now, doctor, state what difference there is as far as regards the slot in the tube and slide in the slot and the incline in the end of the tube, between plaintiff's exhibit C and defendant's exhibit 5a? I do not refer to the size of the parts or their shape, but to the parts as such. A. The mechanical principles?

45 Int. Yes, sir. A. There is no difference in regard to the mechanical principle involved in the slide nor in regard to the incline; but there is a difference, one being conical and the other cylindrical.

46 Int. A mere difference in shape? A. I didn't say a mere difference; but there is a big difference; one is conical and the other cylindrical.

47 Int. Does the fact of one being conical and the other cylindrical affect the slide and the incline? A. No, sir.

48 Int. What difference then is there, if any, in the functions of the parts? A. There is this difference; one is conical and the other is cylindrical.

49 Int. My question refers entirely to the functions of the incline and the slide? A. There is none or only a trivial difference."

* * * * * * * * * * * *

"78 x Int. Does the use of the incline in that instrument have its foundation in any necessity of the structure of the urethra? A. Yes, sir; it prevents, in pulling it out, the catching of the urethral membrane. But its principal object is to make it easy to clean. It prevents the catching of the mucous membrane.

79 x Int. Is there any liability to catch the mucous membrane in the urethra? A. Yes; and it is very painful.

80 x Int. It is best to shut it up? A. Yes; and there will be no danger of catching.

81 x Int. That, you say, is an old instrument in surgery? A. Yes; it is old."

Expert witness, KNIGHT, testified as follows concerning Exhibit 5a (Rec. p. 115):—

"6 Int. State what experience you have had tending to qualify you to testify as an expert in patent cases? A. Since early youth

I have been more or less engaged in mechanical manipulation and mechanical studies, and as I have said, since the time I have been engaged in my present business I have had to carefully and critically examine mechanical devices.

7 Int. Have you or not been frequently called to testify in patent litigation? As an expert? A. Yes, sir; I have frequently testified as an expert in such matters.

8 Int. State whether you have read and understand the patent issued to A. W. Brinkerhoff, March 2, 1880, No. 224,991, here in suit? A. I have read the specifications to that patent and understand it.

9 Int. You may give your understanding of the instrument there shown and described.* A. The body of the instrument consists of a conical tube closed at the end and circular in transverse sections. In one side is a slot having parallel sides and occupied by a slide extending from end to end of the tube. The smaller end of the tube is closed and has a rounded form of which the end of the slide partakes. At the inner side of the tube end is an incline. At the larger end of the tube is an out turned lip or flange; the body of tube and the slides are each supplied with a handle by which they may be manipulated.

10 Int. Look at defendant's Exhibit 5a, and state what relation it bears, in your opinion, to the patent sued upon? A. I find in this a tube with an outside bead at the outer end in the same position as the lip or flange of the Brinkerhoff device. The tube has a slot extending from end to end with parallel sides; has an incline at the inner part of the rounded end; and has a slide adapted to fill the slot. The slide has upon it a handle; so that I find in this instrument these features in common with the Brinkerhoff device.

11 Int. What further do you find in the Brinkerhoff device that is not found in Exhibit 5a? A. The Brinkerhoff device has a conical form which is not found in Exhibit 5a; and a tube or body has a handle "D" which I don't find in the instrument.

12 Int. By conical form do you mean the tapering shape of the tube? A. Yes, sir; I mean the tapering shape of the tube.

13 Int. As a patent expert do you understand that the difference you have mentioned in the Brinkerhoff device over exhibit 5a constitutes any part of Brinkerhoff's alleged invention? A. I don't understand that they do, unless the closing words of the patent might be understood to limit the device to the conical or tapering form. The claim (2) having the words "substantially as and for

the purpose herein set forth;" and claim (3) having the words "substantially as described and for the purposes herein set forth." If these terminating clauses of the claims may be held to apply to the tapering form, it would make a difference between the Brinkerhoff device and Exhibit 5a.

14 Int. Look at exhibits 1, 2, 3, 4, 5 and 6 of the stipulation and state whether they show the tapering form found in the Brinkerhoff device? A. No, sir; they do not.

15 Int. State what, if any features, you find in exhibits 1, 2, 3, 4, 5 and 6 of the stipulation that are not found in defendan't Exhibit 5a, and are found in the Brinkerhoff device? A. I don't see any. Unless the out-turned flange at the outer end of the tube may be considered to be so. But I regard the bead in the same position upon Exhibit 5a as substantially the same thing, as it would no doubt fulfill the same office.

* * * * * * * * * * * * *

19 Int. Do you or not find any element in the three claims of the Brinkerhoff patent that are not also found in Exhibit 5a?* A. No, sir. I don't find any elements of the three claims of the Brinkerhoff patent that are not present in Exhibit 5a.

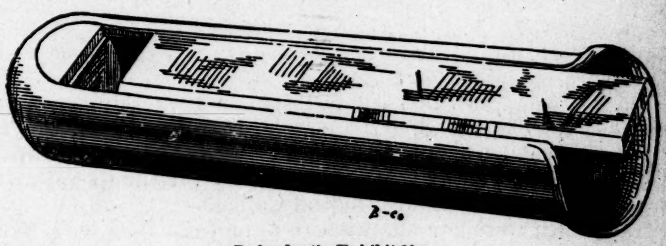
* * * * * * * * * * * * *

Redirect Examination.

1 Int. Would it require anything more than ordinary mechanical skill, in your opinion, to make the upturned end of Exhibit 5a straight? A. No, sir; I think it would take a very small amount of mechanical skill to straighten that; and would not require any invention.

2 Int. What then would be the difference between it and the exhibits 1, 2, 3, 4, 5 and 6 except as to the length and the diameter of the parts? A. It would be substantially the same, excepting as to matters of porportion, length and diameter."

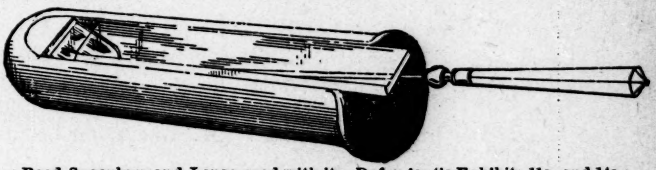
While we think this Exhibit 5a is a complete anticipation of all three claims of patent sued on, still there is much more that is old, and we will proceed to review it. Next there is the old Reed speculum, defendant's Exhibit 11a.



Defendant's Exhibit 11a.

This shows a tube or cylinder with a slot in the side extending almost the entire length and occupied by a slide. The slide in this exhibit extends nearer the entire length of the tube than does defendant's.

This instrument appears to us to be a complete anticipation of the first claim of the complainant's patent, and when taken in connection with defendant's Exhibit 2a or 14a, which were used with it, the two completely anticipate all three claims of the patent. We here give an illustration of the two as used together.



Reed Speculum and Lense used with it. Defendant's Exhibits 11a. and 14a.

This Reed speculum is at least twenty years old.

Dr. OUTTEN (p. 74 et. seq.) says: —

"1 Int. Please give us your full name, age, residence and occupation? A. Warren B. Outten; 3518 Chestnut street, St. Louis; physician and surgeon.

2 Int. How long have you been practicing your profession? A. Since 1866.

3 Int. Where? A. In St. Louis.

4 Int. Are you familiar with what is known as rectal speculums? A. Yes, sir; moderately well posted.

5 Int. Do you know of such an instrument wherein is combined a tube with a slide extending the length of the tube? A. I remember to have seen specula of that kind about 23 or 24 years ago.

6 Int. How do you fix that date? A. By the time I was attending lectures at the St. Louis Medical College.

7 Int. When were you admitted to practice? A. March, 1866.

8 Int. Was it prior to that time you saw these? A. Yes, sir; prior to that time.

9 Int. Look at defendant's Exhibit 11a and state how those instruments differed, if at all, from this exhibit? A. I have seen very nearly the same instruments where a slide was used to keep the mucous membrane from projecting out of the cylinder and would be pulled out the proper distance for the purpose of the mucous membrane projecting within the view of the speculum.

10 Int. When was that? A. That, I think, was during the year 1864, 5 or 6.

11 Int. Were they common? A. I don't know as to that. I know they were lectured upon. The various ways of examining the rectum.

13 Int. Who lectured upon them? A. Professor Charles A. Pope.

14 Int. Is he living? A. No, sir; he is dead.

1 x Int. Doctor, I understand you to say that you saw a speculum with a slide fully twenty years ago in the hands of Dr. Pope? A. Yes, sir.

2 x Int. What was he doing with it? A. Lecturing before the class.

3 x Int. Do you know whether that instrument was ever patented or not? A. No, sir.

* * * * * * * * * * * * *

8 x Int. For what purpose was that instrument made? A. It was made for the purpose of examining the rectum, and at that time a larger tube was also made for the examination of the vagina.

9 x Int. Were these two tubes in the instrument? A. Yes, sir; they had different sizes for the speculums. Two.

10 x Int. Two in the same speculum? A. No, sir; different sizes.

11 x Int. Did the slide in that case extend the full length of the

slot, from end to end, and cover it? A. My conception was it did, for the purpose of forming a smooth surface, in order to introduce without injury to the mucous surfaces.

12 x Int. Did you ever have that implement in your hands? A. *I think I did; because I saw it not once but for near three years.* Dr. Pope was a man, I suppose, that had more instruments than any ten of the surgeons in St. Louis at that time.

* * * * * * * * * * * * *

17 x Int. Was there a plug in the larger end as well as in the smaller? A. No. My recollection of the instrument was that there was a projecting handle at the lower part in order to hold on at the time of introduction and then withdrawing the slide.

18 x Int. Are you certain there was not a plug in the larger end? Obturator? A. I don't remember that there was anything of the kind in the speculum at that time.

* * * * * * * * * * * * *

21 x Int. Was not that slide hinged — hinged on the side so that it fell along inside the wall of the speculum? A. No, I think not.

22 x Int. Was there any means for retaining it in position when it was introduced into the rectum? A. No. It was my conception that it was fixed in the slot.

23 x Int. You speak of your conception. We are inquiring of your recollection? A. Then my recollection as far as it goes.

24 x Int. Was that the first time you ever saw a speculum with a slot in its side and a slide in the slot? A. Yes, sir.

25 x Int. Did Dr. Pope ever lecture to you how that could be used with a mirror? A. No; Pope didn't.

26 x Int. Could you, from your recollection and not from anything you may have seen since that date, make a sketch of that speculum? A. I think I could.

27 x Int. Could you do it accurately? A. I don't know whether accurately; but I could give you my recollection as far as I have got it.

* * * * * * * * * * * * *

30 x Int. Have you paid very much attention to these instruments during the past ten years? A. No; I have not; because I use a different line of speculums entirely.

* * * * * * * * * * * * *

32 x Int. I understood you to say that you couldn't remember when you first saw a speculum with a slide in its side and an in-

clined front with an interior opening? A. Yes; you are correct in that.

33 x Int. Would you not undertake to tell whether it was three or four years? A. No, sir; because I have an indefinite idea of that thing."

The witness, in the last two answers, refers to an instrument having *both* a slide and incline and not to an instrument having a slide only or an incline only.

Redirect Examination.

"1 Int. When you refer to an incline in front, in combination with the slide, do you mean a permanent, fixed incline, or do you also include a mirror? A. I have seen the laryngoscope used in conjunction with the ordinary old time Ferguson speculum. Defendant's exhibits 1a and 2a.

2 Int. You stated on cross-examination that you never saw Exhibit 11a actually used? A. No, sir.

3 Int. Did or did not Pope describe the use of it to the class? A. Yes, sir; that was part of the teaching."

On the question of a slide extending the entire length of the tube, Dr. MICHEL testified (Rec., p. 92 *et seq.*): —

1 Int. Please give us your full name, age, residence and occupation? A. Charles Eugene Michel; 54; residence, St. Louis; physician and surgeon; oculist at present.

2 Int. How long have you followed the profession of surgery, A. Twenty years.

3 Int. Up to what period? A. Up to ten years ago.

4 Int. Where did you practice prior to ten years ago? A. St. Louis. Not the entire time.

5 Int. How long did you practice in St. Louis? A. After the war. I was in the army; aud prior to that in the hospitals of Europe.

6 Int. Are you familiar with what is known as rectal speculum? A. I am.

7 Int. State when you first used such an instrument? A. 1855.

8 Int. State when you first used such an instrument in this country? A. 1855.

9 Int. How was that instrument made? A. At that time it was a simple tube, with an opening at the end. Fenestrated opening.

10 Int. State when you first knew of a rectal speculum being used, if ever, having a slide extending the length of the tube? A. I can't fix that date.

11 Int. How long do you know of such instruments being used? A. A little explanation will clear that point. A speculum is what we call an endescope; and speculums had the slide prior to 1857. I can't say how long.

12 Int. Did or did not the slide extend the entire length of the tube? A. It did.

13 Int. As long ago as that? A. It did. It could be varied. It was a slide that could be varied from one end to the other; made larger or smaller, — that is, greater or less in length. It was a slide passing the full length of the instrument.

14 Int. Were such instruments in general use at that time? A. Yes, sir; I had them myself."

On the question of the Reed speculum witness GRADY, a gentleman who, ever since 1877, has been selling this class of instruments says (Rec., p. 99 et seq.):—

"9 Int. When did you first, if ever, see a tubular speculum having a slide? A. When I first went into business.

10 Int. In what year? A. 1877.

11 Int. What time of the year? A. Spring; I can't give the exact date; spring of 1877.

12 Int. Please describe that speculum? A. It is a speculum of tubular shape containing a slot and a slide, with solid end, known as the Reed speculum.

13 Int. Look at this Exhibit 11a and state whether this is the speculum that you have referred to? A. That is the speculum. Yes, sir.

14 Int. That is one of the kind? A. That is the Reed speculum.

15 Int. You don't mean this particular instrument; but one of

the kind? A. Yes; one of the kind. That is a model of the instrument.

16 Int. Where and by whom was this particular instrument made? A. I had that made at our shop in this city when this first suit was brought against Mr. Aloe.

17 Int. What was your purpose in having it made? A. To show Mr. Aloe exactly what the Reed speculum consisted of.

18 Int. Was this speculum on general sale in the spring of 1877? A. It was.

19 Int. Was this instrument sold at that time of the same shape and design as the one Exhibit 11a? A. Yes, sir.

20 Int. I presume it was finished up. A. Yes. The one shown is only a rough model, not finished at all.

21 Int. But so far as the slide and tube are concerned it properly represents the speculum sold at that time? A. Yes, sir.

22 Int. Also as regards the plugged or solid end? A. Yes, sir."

The defendant, ALOE, testified as follows concerning the Reed speculum (Rec., p. 109, et seq.): —

"26 Int. State when you first saw a speculum having a slide similar to that contained in the plaintiff's Exhibit C? A. In the year 1874, 1875 and 1876, as I visit the eastern markets once or twice a year and have seen speculums such as Exhibit 11a in different show cases of manufacturers of surgical instruments in the cities of New York, Philadelphia, Boston and Baltimore.

27 Int. When? A. In the years mentioned; later also.

28 Int. What was the construction of these instruments? A. As far as my recollection goes, very similar to Exhibit 11a.

29. Int. Can you mention any difference between these instruments and Exhibit 11a? A. I can't, except that they were fully finished, — smoothed off. This is a rough sample."

HERMAN SPECKLER, an old instrument maker, testifies concerning the Reed device, or one similar to it. He says (Rec., p. 70 et seq.) that about 1876 or 1878 either Doctor Hodgen, of this city, a Dr. Bave, of Nashville, Tenn., brought him one of these instru-

ments to have an incline put into it. We quote from his deposition:

"13 Int. Go on and mention any others you can? A. There were others. We set lots of them. Cylinder speculums, afterwards with a glass slide in them. That was the first one I saw after it.

14 Int. What was the name of that speculum? A. I don't remember that it had any name at that time.

15 Int. How was it made? A. Similarly made to this.

(Witness refers to instrument here offered in evidence by the defendant and marked Exhibit 11a.)

16 Int. Go on and describe this? A. That speculum at that time was brought to me by a doctor. I don't remember any more whether it was old Dr. Hodgen, or if it was old Dr. Paul Bave of Nashville, Tenn. He was at that time operating surgeon in the Missouri College.

17 Int. State here when that was? A. It could not be later than 1876 or 1878.

18 Int. Go on and state how that instrument was made that was brought to you? A. It was made out of white or soft metal, some call it pewter, and as a matter of course it is called block-tin; but it is a composition. That speculum had a handle to it made of the same material. Had also a slide and that slide was made of glass flat. Was about, if I remember right, about the outside diameter was not more than 3-4 inch, it may be 5-8; but was about 3-4 inch; the outside diameter.

19 Int. How did the slide work in connection with the tube? A. As an ordinary slide does — the groove was in the metal and the glass slide was beveled on two sides.

20 Int. Was it in this respect like Exhibit 11a? A. No. It had two bevels. This had only one. The glass was beveled on two sides.

21 Int. How about the groove? A. The metal was similar to that, a T groove.

22 Int. Did the slide extend the length of the tube? A. Yes, sir.

23 Int. Clear to the end? A. Clear to where the plug which was inserted in front stopped.

24 Int. Like Exhibit A? A. Yes, sir.

25 Int. What was that instrument brought to you for, by this Doctor?* A. The reason he brought it to me — what he wanted

done was, in the first place he complained that the speculum was too rigid to withdraw from ths rectum.* Then he also wanted to get more light to see and asked me to put a mirror in it.* And I made him that speculum, — a mirror, a common looking-glass mirror, because we had no others. Common reflector of common looking glass material. The mirror was set at an angle of 45 degrees so as to reflect upwards.

26 Int. Which way did it incline — towards the tube or bottom of the speculum? A. Towards the upper end.

27 Int. How did you fasten the incline in the tube. A. That bothered me a great deal at that time. There was no other way. I tried first with shellac, but didn't succeed and spoiled my mirror. Then I fastened it with plaster paris and that stuck a little.

28 Int. You say the doctor brought you this between 1876 and 1878? A. Yes, sir; about that time.

29 Int. How do you fix the time? A. Because that time I had my shop on Pine street, between 7th and 8th, on the north side.

30 Int. When did you remove from Pine, and where to? A. I removed from Pine street, I believe it was in in 1879, to the corner of 8th and Olive, opposite the Post Office building on the second floor.

31 Int. When this instrument was repaired by you what was the construction of it then? A. It was a cylindrical instrument,— speculum, — a straight cylindrical speculum with a slide in it, tapering end, so as to make the introduction of the instrument easy; and had an inclined mirror.

32 Int. Was it like defendant's Exhibit 11a substantially? A. Yes, sir; but the end was more pointed; it was not so abrupt; the point was about 1-2 inch long.

33 Int. Did or did not the tube have a handle? A. The tube had a flat handle cast out of the same material.

* * * * * * * * * * * *

17 x Int. In your examination in chief, you were shown defendants' Exhibit 11a, having a glass slide. When did you first see that instrument Exhibit 11a? A. It was between 1876 and 1878.

18 x Int. I mean this particular instrument that you now look at? A. I believe it is about three or four months ago.

19 x Int. Do you know who made it? A. Yes, sir; we made the one you have got in your hand in our shop.

20 x Int. By we you mean whom? Whose shop do you mean? A. A. S. Aloe & Company.

21 x Int. In St. Louis? A. Yes, sir.

22 x Int. Did you superintend the construction of this instrument? A. Yes, sir.

23 x Int. Under whose direction did you make it or cause it to be made? A. Our clerk told me to make an old-time Reed speculum, and I made it.

24 x Int. You attempted to have it made just as nearly like an old Reed speculum as you could remember the old Reed speculum? A. No, sir; because I left out the handle.

25 x Int. Where was the handle in the old Reed speculum fixed to the instrument? A. On the lower side opposite the slide.

26 x Int. There was no handle fixed to the slide? A. No, sir.

27 x Int. The interior of the old Reed speculum was just about as near the interior of this instrument as you can remember it? A. Yes, sir.

28 x Int. In all respects? A. Yes, sir.

29 x Int. That old Reed speculum, was it ever manufactured by you? A. No, sir; I merely altered it.

30 x Int. You had worked about it altering and improving it? A. Yes, sir.

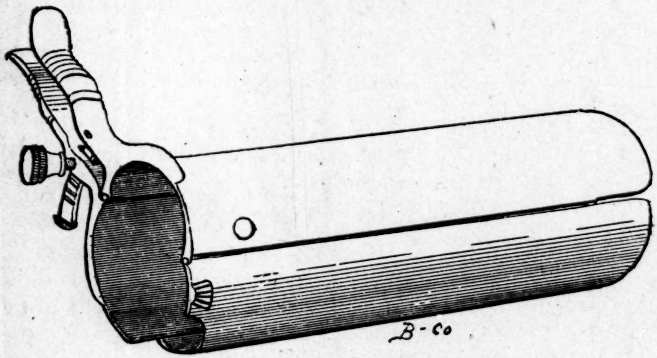
31 x Int. What improvements did you make in the old Reed speculum and when? A. It was about either in 1876 or that neighborhood. Between 1876 or 1878, but not later; it can't be later. What I made was to avoid the abruptness of the shoulder where the slide stops."

On page 113, *et seq.*, of the record, Mr. SPECKLER produces his book and testifies that the entries show that he did this work for Dr. Hodgen prior to 1876, and although this proof is not all that could be desired from books of account, yet taken in connection with all the circumstances of the case, we think it clearly enough establishes the fact to leave but little or no doubt.

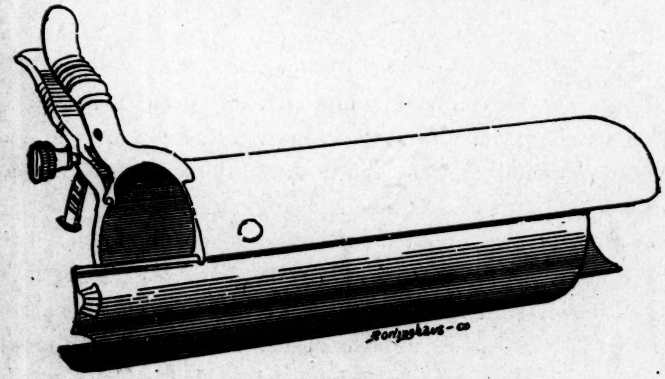
From the above it seems to us that there can be no doubt that the Reed instrument existed prior to complainant's alleged invention, and that if so it is a complete reference to the first claims of the patent. It seems to us also clear that if there was used in connection with this an inclined lense (defendant's Exhibit 2a) —

a question upon which we think sufficient proof has been adduced, to say nothing of the stationary incline put in by Mr. Speckler for Dr. Hodgen — that this use alone clearly anticipates not only the first but also the second and third claims of the patent.

However, we do not have to rely only on Reed, Exhibit 11a, for a slide, for it is still older in a rectum speculum. See defendant's Exhibit 17a, two cuts of which are given.



Defendant's Exhibit 17a, with slide closed.



Defendant's Exhibit 17a, with slide partly pulled out.

This instrument is at least 25 years old, and is a square anticipation of the first claim of the patent.

Dr. MICHEL testified (Rec., p. 95): —

"38 x Int. You didn't have them, or use yourself, any rectal speculum during the course of your practice in America in which there was a slide? A. I did. But not for the rectum.

39 x Int. For what purpose did you use an instrument having a slide? A. For the vagina.

40 x Int. Have you such instrument now at your command? A. I think I have.

41 x Int. Will you produce it? A. I will.

42 x Int. Not dispensing with the introduction of it, I will ask you first for its general description. A. It is a three-bladed speculum, folded on a stem, one of the valves being movable as a slide, and the other two hinged.

43 x Int. Hinged? A. The two that were hinged constituted 2-3 of the periphery."

CHARLES E. MICHEL, recalled for the defendant, examined by George H. Knight, Esq.

"1 Int. Are you now able, Doctor, to produce one of the instruments about which you testified yesterday; and if so please tell us what instrument it is; and state when you used such an instrument in this country? A. I have the instrument in my hand. It was made in 1858, and I used it in this country in 1860.

2 Int. By what name is it known in the profession? A. That I can't tell you.

3 Int. What is the construction of it? A. It is a speculum with three hinged parts which may be arranged into a tubular form, with a conical shape plunger which may be withdrawn, and one of the leaves arranged to slide in and out. The opening may be made larger or smaller at will.

4 Int. Were such instruments common at the time you mention? A. They were.

5 Int. Is that the instrument shown on page 60, part III., Exhibit 13a, figure 196a and 196b and 196c? A. It is.

(Instrument mentioned by witness offered in evidence and marked defendant's Exhibit 17a.)

6 Int. For what purpose did you use the instrument Exhibit 17a? A. As a vaginal endescope.

Cross examination waived."

Dr. MUDD (Rec., p. 63, *et seq.*) says:—

"13 Int. What form have you used the slide in? A. Used it in an old form of French instrument in which the speculum was introduced closed and opened and one blade removed. Such an instrument has been in the college museum for twenty years or more; twenty-five perhaps.

14 Int. In this country? A. Yes, sir.

15 Int. Did you ever use an incline in a speculum? Other than a rectal speculum? A. Yes, sir; used in an endescope for the bladder.

16 Int. Since when? A. I have used it commonly for the last five years. I used it in a French instrument, perhaps twelve years ago.

17 Int. In this country? A. Yes, sir.

18 Int. How was it constructed? A. The old instrument?

19 Int. Yes, sir? A. As I remember it had a glass. A cylindrical instrument, oval point, with an opening covered with glass and under that a mirror set on the incline as this (referring to Exhibit 7a). The mirror there was a glass mirror; not a polished surface.

20 Int. Could that glass be removed? In that instrument? A. I think not. I think it was fixed.

21 Int. What was the object of the glass? A. To keep the secretions of the urine out of the speculum. Keep discharges out of the speculum.

22 Int. How early do you know of slides being used in speculums? A. The earliest was in this instrument that I speak of, where one section was removed after introduction of the instrument. That is an old instrument, perhaps 25 years old.

23 Int. Did the slide close a slot in the tube? A. The tube complete was made by perhaps 4 or 5 sections. One of these when opened was thrown aside so as to leave that portion open (Referring to plaintiff's Exhibit C.).

24 Int. Was the portion that you speak of being removed in this

old instrument similar to the slide in plaintiff's Exhibit C?* So far as it made up the complete tube when inserted in the slot? A. It answered the same purpose; that is, it completed the section.

25 Int. Could that slide in the old instrument be gradually withdrawn after the instrument was inserted; the tube inserted?* A. The entire section was removable.*

26 Int. Did or did not that removable section extend the entire length of the tube? A. Yes, sir. Extended the length of the tube.

27 Int. Did the tube have an incline at its inner end?* A. I think not.*

28 Int. When were such instruments first used to your knowledge in this country? A. The first of that kind that I saw was in a collection of Doctor Pope. Perhaps I examined it in 1867 or 1868.

29 Int. Is Doctor Pope living? A. No, sir.

30 Int. When did he die? A. In 1871, perhaps, or somewhere near that time.

31 Int. Where did he practice? A. Here in St. Louis. Went to Europe. Lectured here last in 1866. Returned here in 1870 or 1868 for a visit.

32 Int. Was he a professor in the college? A. Yes, sir; of surgery in the St. Louis Medical College."

Witness SPECKLER says (Rec. p. 72): —

"39 Int. How about the slide? A. They had slides. The slide in the old vaginal or Sagalla, or tri-valve, had a slide going the whole way of the instrument, and the slide is at the same time a joint, and the instrument is folded together; the two parts come together that way (illustrating), and then the third one falls over because you got it out of the groove, and it falls over. When the speculum is then introduced then the three parts form a cylinder. If you want to use them the slide there is in the front part of the speculum, a catch — if you press that catch down, and you can use it for a slide and draw it out so far as you want to draw it entirely out (illustrating).

40 Int. Was there any incline used in connection with this? A. No, sir; only an obturator. But they used later what was called a laryngal mirror with it. The same as shown in Exhibit 2a.

41 Int. How was this mirror used in connection with the speculum and tube. A. The speculum was introduced, so far as I know; as a matter of course I am not a surgeon; I am an instrument maker; I don't use instruments, but still the maker usually has the instrument explained to him, — so I got my information from a surgeon, — and he generally tells me how he wants it used, — and tells us to make it the best way we can as possible.*

42 Int. Was a mirror inserted into the tube? A. Into the speculum. (Witness here takes Exhibit 2a, and inserts it into Exhibit 11a, illustrating its use.)

43 Int. When was this speculum illustrated in a catalogue, if ever, to your knowledge? A. To my knowledge about twenty years ago at least. The Sagalla speculum; tri-valve. About twenty years ago.*

44 Int. Have you one of those old catalogues? A. No, I believe not; I left all my tools and everything at Leslie's when I went to Aloe's.

45 Int. Look at figure 3831 on page 726 of Sheperd & Dudley's illustrated catalogues of surgical instruments and state whether the instrument shown in this figure is the kind you have just been describing.* A. Yes, sir.*

46 Int. When did you see such an instrument illustrated in a catalogue first? A. At least about twenty years ago. I can't fix the time for certain.*

47 Int. Were such instruments in common use at that time?* A. Yes, sir.*

48 Int. In connection with them the inclined mirror shown in defendant's Exhibit 2a?* A. Yes, sir."

ANDREW LESLIE, a well-known local dealer in these instruments, testified concerning this tri-valve speculum as follows (Rec. p. 87.)

" 19 Int. Do you know of any speculums with slides attached? A. You mean any kind of speculum?

20 Int. Yes, sir. A. Yes, with sliding portions. A speculum in which one portion is intended to be removed to uncover the surface of the cavity intended to be examined is an old plan. I have in mind specially speculums. One of the oldest forms consisted of three blades, which dilated around the axis of the instrument.

That is, there were three blades and a hinge here and one there, and by pressing the handles here it opened into a cylindrical form. Then one of the sides was capable of removal for its entire length.

21 Int. How old is that slide? A. It was made before I was in business. One of the oldest forms.

22 Int. Will you examine this book handed you (offered in evidence and marked defendant's Exhibit 13a), on page 60 and part III A, and state whether or not the speculum as shown in the cut is the one described by you? A. Yes, sir. Figures 196a and 196b on that page.

23 Int. That was known as what instrument? A. Segalla's. The upper blade there is removable. There is a little thumb-catch which you press and that releases a little spring that held it in place. Then that blade can be withdrawn to any degree. I also remember that a model came into our place in or previous to 1860, which had an arrangement so that the blades could be removed. It was a vaginal speculum with some 16 to 20 blades, and which were hinged about 1-4 of the way from one end, and you could distend the whole set; as it stood closed it was in a conical form, apex of the cone, and being at the inner end of the instrument in the body, when it was in use then these blades could be arranged to dilate so that the apex of the cone became the base; increasing many times larger than the outer end. Then you could remove any number of these blades you wanted all the way around, from one to any portion, including the whole.

26 Int. How long do you, personally, know of the slides being used in such instruments? A. It is as long as I know anything about the instrument; thirty years. This slide here.

27 Int. Can you state whether or not this mirror, Exhibit 2a, was ever used in connection with this instrument? A. You mean what I know of my own knowledge from seeing it used, or knowledge of the business?

28 Int. Knowledge of the business? A. I only know that this instrument is used to examine all of the cavities of the body; not only the vagina and rectum, but urethra and ear. I have made them the same in form as this, but of polished metal, as the glass was too thick — but the same in form; and reduced speculums to pass into the ear.

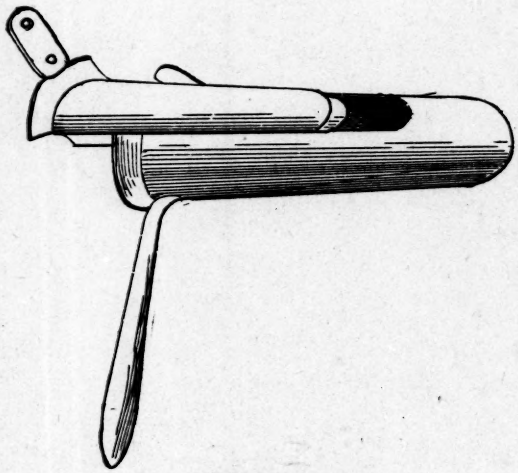
29 Int. Do you know of their being used in connection with a speculum?

A. They were always used in connection with speculums, except

in the mouth. But in the urethra, vagina and rectum they must be used in connection with the speculum.

30 Int. Do you know how long they have been used in connection with the speculum? A. Quite as long as the instrument has been in use at all. This instrument was brought out first for use in the throat, and my remembrance of it dates from 1861. And ever since then the instrument has been used in connection with the speculum.

This ought, we think, be enough to show that the slide, extending the entire length of the tube, dates far back of complainant's alleged invention, but if further proof is desired, see pages 171 and 172, Hilton's "Rest and Pain." Defendant's Exhibit 3a, where this instrument is shown.



Hilton's Speculum.

As above stated, it was from this publication that the defendant got the idea of making the instrument upon which he is sued.

There is some doubt whether the dates of complainant's alleged invention is not earlier than the date of this second edition of this publication; but this matters little, as the first edition of this work was published in 1876, and had these cuts found on pages 171 and 172 of this edition.

Dr. BERNAYS testified (Rec., p. 47):—

"Augustus C. Bernays, being duly examined, cautioned and sworn as a witness on behalf of defendant, deposes and says as follows:—

1 Int. Please give us your full name, age, residence and occupation? A. My full name is Augustus Charles Bernays. My age is 33. My residence is St. Louis. Occupation, surgeon. Practice of surgery.

2 Int. How long have you been following your profession in this country? A. I graduated in 1876. First at the University at Heidelberg, Germany. Since then I have been practicing my profession in this country, 10 years. After I graduated in Heidelberg I spent two years in Berlin, London, and other places studying my specialty, surgery.

3 Int. Whom did you commence practicing under? A. I never practiced under anybody. I was sent to Heidelberg when I was about 20 years old, or not quite 20 years old: and I began the study of medicine there in 1872, and graduated in 1876. They required four years of continuous study before they admit you to examination, but I was born in America. I am an American.

4 Int. Were you acquainted with Hilton, the author of the publication entitled, Hilton's "Rest and Pain." A. Yes, sir.

5 Int. Where did you know him? A. I knew him in London. Heard him lecture and saw him operate at Guy's hospital and other hospitals.

6 Int. What lectures have you reference to? A. He delivered a course of lectures that I don't remember the name of. They were named after some celebrated surgeon. The Hunterian lectures. I don't remember the name but they were delivered before the Royal College of Surgeons, England, and besides that clinical lectures at the hospitals.

7 Int. Are they published? A. Yes, sir

8 Int. What in? A. Those in England by request of his students. Those that heard them, they thought them so valuable, they thought that they should be printed, and they were printed first between 1872 and 1876; I don't remember the exact year; and then Wm. Wood & Co. reprinted it in 1879, and that copy is the one you have in your hand.

(Complainant enters objection to all testimony touching the delivery of these lectures and the publication of them outside of the United States.)

(Defendant here offers in evidence the book referred to by witness in his last answer, which is marked defendant's Exhibit 3a.)

(Complainant objects to the admission of said book.)

9 Int. Where was this book, defendant's Exhibit 3a, published in this country? A. By Wm. C. Wood and Company, New York; and in London it was published by Churchill and Company.*

10 Int. Please look at the instrument marked Exhibit C, to deposition of plaintiff by Almon Hall, United States Circuit Court, Northern District of Ohio, October 16th, 1886, and on the reverse side Alex. W. Brinkerhoff *v.* Albert S. Aloe, 2594 Equity United States Circuit Court, Eastern District of Missouri, and state when you first saw such an instrument in this country? A. I saw this instrument first, — I suppose this is a sample of Hilton's speculum, I suppose that is one, — I don't know where you got it. I never saw it in this country until I returned; but I saw Hilton use almost the identical speculum before I returned to this country between 1872 and 1878.*

11 Int. State, doctor, if you will, when you first saw such an instrument in this country? A. I should say I first saw an instrument of this kind in 1878, in the instrument maker's stores in this country. The difference between the instrument I saw in the shops and this instrument is very trivial. The flange might be the 1-8 of an inch larger; and the handle of the slide was somewhat shorter than the instrument I now have in my hand.

12 Int. Did the slide extend the entire length of the tube? In those instruments? A. That I cannot say; it extended nearly the entire length. This does not extend the entire length.

13 Int. Did that extend as near the entire length as the one you hold, Exhibit C.? A. About as near; I cannot tell. I cannot possibly remember that. If I had a chance to look up the matter I might have prepared myself. It extended substantially the same length.

14 Int. Did these instruments have an incline similar to Exhibit C. on the inside of the tube? A. Yes, sir; they had that for the purpose of making the focal matter easy to clean out.

15 Int. What office did that incline serve in withdrawing the instrument after insertion? A. It must serve the purpose of preventing the mucous membrane from catching and being pinched when cleaned out. The incline, if polished, would also serve as a reflector. It would serve the threefold purposes as a reflector and for the purpose of preventing pinching of the membrane, and thirdly to make it easily cleaned.

16 Int. Do you find an instrument similar to that defendant's Exhibit 3a, Hilton's "Rest and Pain?" A. There is an engraving on page 171 of Hilton's "Rest and Pain," very similar to the one I hold in my hand.

17 Int. I believe you have already stated that Hilton published an earlier edition of his work?* A. There was published in 1876 a work; and the preface of that work is reprinted here.*

18 Int. Do you know whether or not, as a matter of fact, the cut shown on page 171, of Exhibit 3a, was in the earlier edition you spoke of?* A. Yes, sir.*

19 Int. Did you ever assist Hilton in the use of the instrument on page 171?* A. I saw him use it.*

20 Int. Where?* A. In London.*

21 Int. Can you state from the fact that you saw Hilton use this instrument illustrated on page 171, Exhibit 3a, that such cut was shown in his original publication of 1876, and is similar to complainant's Exhibit C?* A. Yes, sir.*

22 Int. When did you first use an instrument of this character, having a slot in its side and a slide in the slot? A. I could not tell you that to-day. It is so old. Rectal specula with slides are very old; and if you want to know the year I could not say; but I think they are about twenty years old. I remember seeing one in my father's office in this town, as long ago as, I will swear, as fifteen years. A rectal speculum with a slide. Whether it had this groove in it or not, I don't know.

23 Int. Yes. A slide that moved up and down; but whether it had a groove in the edge I do not know.

24 Int. Did the slide extend as near the end of the tube as the slide in Exhibit C? A. Nearly so. I don't know whether it did so far or not. I cannot be expected to remember that.

25 Int. Were such instruments in general public use as long ago

as you mention in this country? A. I saw it in my father's office, and I suppose they were.

26 Int. Where was your father's office? A. In St. Louis.

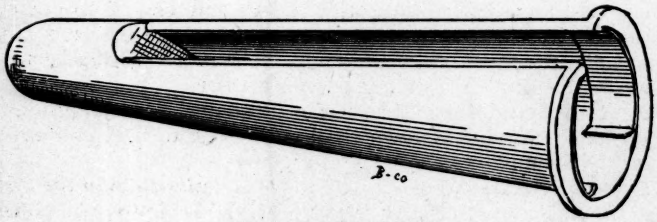
27 Int. What was your father's occupation? A. Practicing medicine. Obstetrics.

28 Int. Did you, then, see such instruments in use in this country prior to the time you went to Europe? A. None but the one my father had. I often cleaned it and handled it.

29 Int. When did you go to Europe? A. In 1872."

Having shown, we think, conclusively, that the slide is old, defendant's Exhibits 5a, 11a, 17a and 3a, and that the slide, in combination with the incline, is also old, defendant's Exhibits 5a, 11a, 14a, there is nothing left but to show that the incline, by itself, is also older than the patent, and then to show that combining the two did not amount to invention, but was a mere aggregation.

As to the incline being old, one of the examples of this outside of Exhibit 5a and Exhibits 11a, 14a, is found in defendant's Exhibit 18a. We give a cut of it.



Defendant's Exhibit 18a.

This instrument was introduced through Dr. Mudd and was, when Dr. Mudd testified (January, 1888), about twelve years old.

We quote from Dr. MUDD's deposition (Rec., p. 62):—

"Henry H. Mudd, being duly cautioned, examined and sworn as a witness on behalf of the defendant, testified as follows:—

Examined by George H. Knight, Esq. :—

1 Int. Please give us your full name, age, residence and occupation? A. 43; physician and surgeon; residence, St. Louis.

2 Int. How long have you been engaged in the profession? A. Since 1866.

3 Int. Where? A. In St. Louis, since 1869.

4 Int. Have you, in practicing your profession, used what is known as a rectal speculum? A. Yes, sir.

5 Int. What form? A. Various forms.

6 Int. Please mention a few? A. Simm's, the bi-valve, and a fenestrated one; also a round speculum, with an opening in the end, a cylindrical speculum.

7 Int. Will you please describe the construction of these different specula and when you first used them? A. I have used the Simms for twenty years. It is the same as the vaginal.

8 Int. Describe the last. A. That is a duck-billed speculum, curved points, concave on one side, convex on the other, simply to hold one portion of the wall of the rectum. The bi-valve has two blades, approximated, which can be separated by a hinge, so as to expose the wall of the rectum on opposite sides. The fenestrated speculum is one with an opening on the side. The cylindrical is one with an opening at the end, usually oblique. The different forms of the fenestrated that I have used, the first was conical in shape, a truncated cone with an opening full length on one side, narrower at the point than at the base; near the opening in this speculum, at the end, was a polished surface *set obliquely to the axis of the speculum*, which serves as a mirror.

(Complainant desires to give notice that he shall avail himself of the rule of law relative to testimony concerning devises that are not produced).

And as a protector to the mucous wall in withdrawing the speculum. (Witness examines instrument handed him.) A polished surface placed as in this instrument. There was also in that speculum a mirror, which was placed along the wall of the speculum, opposite the opening in the side.

(Instrument which witness has just examined offered in evidence by defendant, marked Exhibit 7a).

9 Int. How long did you use such an instrument as this just introduced? A. I think about twelve or thirteen years I have had that instrument.

10 Int. Has it been in general use that time? A. I bought it in an instrument store at that time. It was on sale.

11 Int. When did you first use the bi-valve? A. About ten years ago. Eight or ten years ago. Both of those instruments had been in use longer than I had used them.

* * * * * * * * * * *

33 x Int. What has become of this old instrument you speak of, that you used many years ago, with a mirror arranged on an acute angle on the point? A. I think I have it in my possession, sir.

34 x Int. Will you produce it? A. I can and will."

H. H. MUDD, recalled as a witness for defendant, examined by Augustus Binswanger, Esq.:—

"1 Int. Doctor, in your examination yesterday you testified to the use of a speculum with an incline many years ago; and you were asked if you could find such a speculum, to produce it before the examiner. Have you found said speculum and have you it now here in your possession? A. Yes, sir.

2 Int. How long has that speculum been in your possession, to your best knowledge? A. I can only fix the date approximately. We moved to our office, on 14th street, sixteen years ago. I think it was four or five years after thrt that I bought this speculum. It was an old speculum when we moved to our office on Jefferson avenue, which was six years ago last August. It had lost its mirror at that time and had been partially destroyed.

3 Int. How long in years can you state that that speculum has been in your possession? A. I testified the other day — and I am not far from correct — in saying twelve years.

4 Int. Will you look at that speculum and state in what condition the incline is to-day and what condition it was in at that time? A. It is the same as at that time, excepting it was a polished surface at that time, and served as a reflector.

5 Int. You spoke of a looking-glass being placed in that speculum. Where was that placed and how? A. It was on the side opposite the slot, or opening, and extended from the base to the incline.

6 Int. Is there a slide there in which it fitted? A. Yes, sir.

(Speculum here offered in evidence marked Exhibit 18a).

7 Int. Could that slide be turned in and out? A. Yes, sir.

8 Int. For what purpose was that instrument used, if you know? A. For rectal examination.

9 Int. By you, in such examinations? A. Yes, sir.

10 Int. In this city? A. Yes, sir."

Another example of a stationary incline is to be found in defendant's Exhibit 8a.

Defendant's Exhibit 8a.

Dr. MUDD says that this instrument is 20 years old. We quote from his deposition:—

"46 Int. Look at the instrument I hand you, and state what it is? A. It is an endescope. Modification of Bigelow's evacuating tube.

47 Int. Did you ever use such an instrument? A. Yes, sir.

48 Int. When, and how long? A. I have used it — the evacuating tube of this form, perhaps five years.

49 Int. How long have you used any form of that kind of instrument? A. I have used those since 1878 or 1877. The old evacuating tube for lithotrity has been in use for more than 20 years.*

(The instrument last mentioned is offered in evidence by the defendant, and marked Exhibit 8a.)

50 Int. What difference is there, if any, between this old form of instrument which you say was used 15 or 20 years ago, and Exhibit 8a? A. There is a little difference in the opening, in the end of the tube, and shape, and a difference in the size of the tube.

51 Int. A mere difference of degree? A. Yes, sir.

52 Int. Did the old form of instrument have the incline found in Exhibit 8a? A. Practically the same.

53 Int. What was the object of the incline in the old instru-

ment? A. To avoid catching the mucous membrane on the withdrawal of the instrument."

Dr. MICHEL testified concerning this incline as follows (Rec. p. 92):—

"15 Int. When, if ever, did you first know of speculum being used with an incline in the end of the tube? A. About '57.

16 Int. Were they in general use? A. By all eminent men in Europe at that time.*

17 Int. In this country? A. That I cannot assert as I was in Europe.

18 Int. When did you know of their being first used in this country? A. The incline, you mean?

19 Int. Yes, sir. A. In 1860.

20 Int. Were they in general use? A. They were.

* * * * * * * * * * * * *

51 x Int. Do you say that a speculum and endescope are one and the same instrument? A. I do.

52-x-Int. Why do you say that? A. Endescope means view the interior of a cavity; and a speculum is used solely for that purpose.

* * * * * * * * * * * * *

1 Int. Do you remember using yourself, or seeing others use any form of speculum having an incline found in Exhibit 9a, prior to your leaving that branch of the profession, 10 years ago?* A. I have seen the principle used positively. As to the speculum or not I don't remember.*

2 Int. How long ago? A. In 1857.

3 Int. Was the incline in common use at that time? A. As an endescope?

4 Int. Yes, sir?* A. Yes, sir.

5 Int. In this country? A. Yes, sir."

The next is the Squire speculum, defendant's Exhibit 9a.

Defendant's Exhibit 9a.

This, Mr. GRADY says, was on the market to his knowledge as early as 1877. He says (Rec., p. 100): —

"30 Int. State when, if ever, you first knew of a stationary incline being used in the end of a tubular speculum? A. The first I ever heard of a stationary incline was in 1877, the first year I went into business, and the incline was in a rectal speculum called "Squire's."

31 Int. Look at the instrument, Exhibit 9a, and state whether that is what was known at that time as the Squire's instrument? A. That is the instrument.

32 Int. State whether or not that instrument was common at that time? A. To the best of my knowledge it was a rather new instrument at that time. I don't think it had been in the market over three or four years at the most.

33 Int. State whether or not you know of the Reed or Squire's speculum being illustrated in catalogues as early as 1877?* A. The Reed speculum I know was illustrated; as to the Squire's I don't remember.

34 Int. What was it in? A. The Reed speculum was illustrated in Shepard & Dudley's catalogues, of New York City; and J. H. Gomrig's, of Philadelphia.

35 Int. When were these respective catalogues published? A. That I can't say. The catalogue of Gomrig was published before I went with them, in the spring of 1877. It was published before that. Shepard & Dudley's catalogue was out when I went into business so that it must have been published before that.

36 Int. How did these catalogues illustrate the Reed instrument?* A. By wood cut or electroplate of the instrument.*

38 Int. What did the figure show?* A. Illustrated an instrument the same as Exhibit 11a.*"

Mr. Grady did not see the Squire speculum until some time after he first went into the business of selling these instruments, but had simply heard of it.

ANDREW LESLIE testified that he has known of the Squire speculum for ten years at least, and it should be remembered that this

testimony was given January 16–18, 1888. Mr. Leslie said (Rec., p. 86): —

"Then there is the Squire's speculum here (Exhibit 9a). That, as near as I can remember, is ten years old or more. There have been other forms. There is what is known as Nott's. That is a modification of his vaginal instrument, a three-bladed, — dissimilar to any here.

11 Int. Have you knowledge also of Reed's speculum? A. I have seen it illustrated in the Philadelphia catalogue for some time. I can't say how long; but it is some considerable time. I can't hardly fix the time.*

12 Int. Will you examine Squire's speculum, Exhibit 9a, and state whether it is in the form you handled some upwards of 10 years ago?* A. That is the form in which I have handled it. At least it is the form in which we first had it. It is the first form of this speculum. There is in the last two or three years a modification in this incline; but this is the earlier instrument. The change they made was to facilitate the withdrawal, and give it a little more incline and concave form.

13 Int. But in what respect does this instrument differ from the oldest form? A. This is the oldest form.

14 Int. Then the modifications you speak of are not in this instrument? A. No, sir; they are recent. Within two or three or four years."

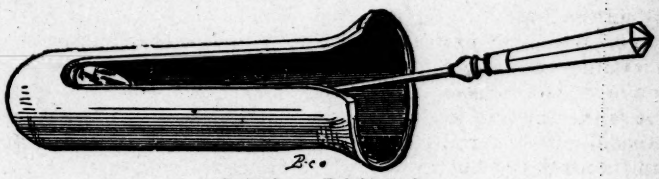
We think it is clear that this Squire instrument was on the market as early as January, 1878.

The complainant calls Mr. Squire in rebuttal and when asked when the instruments were first made, answered that he believed it was 1877. He said the incline was not on at first, and that he did not know when it was added (it was not added by him), but that he first *saw* it "certainly within two years after mine was on sale; I am not sure."

His testimony is thus substantially in harmony with Mr. Grady's and Mr. Leslie's. The instrument shows an incline identically the same as complainant's.

A significant fact concerning this Squire speculum is that it has been advertised and sold right along with, apparently, no opposition from Brinkerhoff.

The only other instrument to be considered in this connection is defendant's Exhibit 1a, 2a. In this instrument 1a is a conical cylindrical tube having a slot, and 2a is the common inclined lense on a stem, which was used with the tube, the two acting exactly the same as complainant's tube and incline.



Defendant's Exhibit 1a, 2a.

This is at least fourteen years old.

In testifying concerning it, Dr. Bryson said (Rec., p. 42): —

"1 Int. Give your full name, age, residence and occupation? A. John P. Bryson, age 41; occupation, physician; residence, St. Louis.

2 Int. How long have you been engaged in your present profession? A. Nineteen years.

3 Int. State whether you have used an instrument in your profession similar to that shown in complainant's Exhibit C? A. How do you mean? Similar in every respect or do you mean in shape and having a tube?

4 Int. I mean the general construction. The tube of the instrument? A. I have used a tube with an opening in the side of it.

5 Int. What have you used in connection with that? A I used an ordinary laryngoscopic mirror.

6 Int. How long have you used such a mirror? A. As far as I can now fix the date about since 1874. The winter of 1874, as well as I can fix it now. I have a way of fixing it in my mind.

7 Int. If you have no objection, state the way in which you fix

it. A. I had a tooth drawn and in showing me the condition of the tooth the dentist used a mirror similar to the laryngoscopic mirror to reflect the light; and also to show the back part of the tooth. That suggested to me the use of the mirror in a rectal examination.

8 Int. Are you positive this was in 1874? A. Yes, sir.

9 Int. You state you first used the instrument at that time. Have you used it constantly since that time? A. I used it for quite a while. I used it whenever I had occasion to use it. Don't know how often that has been.

10 Int. Where did you procure the instrument? A. At an instrument store. I don't know. Some instrument store in the city; either Leslie's, Aloe's or some of the stores here.

11 Int. Look at the instrument I hand you and state whether that is the same instrument you used? A. Yes, sir; it is, excepting that the opening in the side of the tube was closed in front. It was an oval opening in the side, in other words.

(Instrument is here produced by defendant and marked Exhibit 1a.)

12 Int. What did you use in connection with the tube? A. Laryngoscopic mirror.

13 Int. What was the form of it? A. The mirror was roun and set at an angle similar to the one here, except that I my se bent the handle in order to facilitate the use of the instrument.

(Mirror is here offered in evidence by defendant and marked Exhibit 2a.)

I believe that I ought to say that the mirror that I used was a little smaller than that. Very nearly the same size.

14 Int. Now state how you used these two parts, exhibits 1 and 2? A. In searching for some small lesion or disturbance in the mucous membrane such as a fissure of the anus, I could oil and insert this instrument, Ex. 1a., until I came to what I thought was the site of the trouble, and then, by warming the mirror so as to prevent its being caught, would introduce that, and with a head mirror would throw the light upon it. Generally throw the light into the tube with a head mirror on the forehead.

15 Int. Is there any other circumstance you can mention which makes you think it was as early as 1874 you used that instrument? A. There is no other excepting the date of my marriage. I happened to fix that date in a certain way. By that I know it was the winter subsequent to my marriage. Latter part of the winter.

16 Int. Is your practice in the line of the use of these instruments? A. Yes, sir.
17 Int. And has been since 1874? A, Yes, sir."

Dr. BERNAYS testified concerning those exhibits, as follows (Rec., p. 53): —

"56 Int. Please look at defendant's Exhibits 1a and 2a and state whether you know of those parts having been used in connection with each other, and if so, when? A. This Exhibit 1a, I recognize as an old-fashioned rectum speculum that was in vogue during the war. It is the original rectum speculum without a slot, with a mirror. They were not only used in the rectum but specially in the vagina. No. 2 is an ordinary reflector used to examine the vagina, mouth, nose, throat or any other part of the body. The two were used together long ago. Those two have been used together, I suppose. When it comes to swearing to the exact time I don't remember. Old books tell of the speculum. I believe it is Sir William Ferguson's, who died in 1870. This is the ordinary mirror that is used to examine cavities in the body. The two were used together. This reflector was used for the ordinary milk glass speculum. This is a black glass speculum lined with amalgum."

Of course the Examiners in the Patent Office know very little, relatively, of what is going on in the country in any particular art where improvements relating to that art are not patented, and it is a well known code of ethics among physicians that improvements on instruments used in their profession should not be patented but dedicated to the cause. Thus in the office letters (see Rec., p. 23), the only references the examiners are able to refer to are certain catalogues that have chanced to come into his possession. None of the various instruments introduced by the defendant appear to have ever been patented and the examiner in the Patent Office was thus deprived of their use as references. Had these devices been patented or had there, in some way, a

record been made of them in the patent office we confidently believe that this, what appears to us, utterly worthless and void patent would never have been issued. But issued it is, and the defendant has the expense and annoyance of this litigation to contend with when he is only manufacturing what, we believe, he has a perfect right to make, and what he supposed was public property until the filing of this suit. (See Rec., p. 109).

The evidence shows that a tube having a slot and an incline for use as a rectum speculum was common and well known prior to 1878, and that such a tube with a slide was also common at that time and supposing, for the sake of argument (a supposition we do not admit in view of defendant's Exhibit 11a–14a and 5a) that the patentee was the first to combine these two in a single instrument, did he make a patentable invention?

This question only affects the second claim of the patent. The first claim is broadly on a slide, the third on the incline, and the third point of defense that we are now going to consider does not apply to the first or third claim; they must stand or fall on the evidence we have already considered.

The law is well established that a combination claim where the elements do not affect one another, or where they fail to *unite* in performing a new and useful result, the claim is invalid. The law, as frequently laid down by this court, never intended to encourage as invention the mere commingling of a number of elements that do not unite in accomplishing a function.

Hailes *v.* Van Wormer, 20 Wallace, 353;
Beckendorer *v.* Faber, 29 U. S. 357;
Double Pointed Tack Co. *v.* Two Rivers Manufacturing Co., 9 Biss. 258;
Metropolitan Wringing Machine Co. *v.* Young, 14 Blatch. 46;

Webster Loom Co. *v.* Higgins, 15 Blatch. 447;
Fond du Lac Co. *v.* May, 137 U. S. 395;
Hendy *v.* Iron Works, 127 U. S. 370;
Aron *v.* Railway Co., 132 U. S. 84.

In the case at bar it may be a convenience to have the slide and the incline in a single instrument, but as long as there is no co-action between them there is no invention.

If we are to believe some of the most eminent physicians of St. Louis, and the patent expert who testified in this cause, the second claim of this patent is as clear an example of an aggregation as ever existed.

Dr. BERNAYS testified, on this subject, as follows (Rec., p. 53):—

"54 Int. Now, my question is, Doctor, does the incline in Exhibit C operate the same by itself as it does in connection with the slide, or does it operate differently?* A. No, sir.

55 Int. Does the slide operate any differently when used in connection with the incline; or would it perform its functions just as well in the absence of the incline? A. Yes, sir.

Dr. MUDD testified as follows (Rec., p. 65):—

"37 Int. Does the slide perform any function when used in connection with the incline that it does not when used by itself? A. I should think not.

* * * * * * * * * * * *

Redirect examination.

1 Int. How often did you use this instrument that you term as Brinkerhoff's instrument? A. Perhaps a dozen times.

2 Int. What did you think of that instrument as compared with others? A. I didn't see any special advantage in it. I think Simm's speculum the best of the lot.

3 Int. There is no advantage, then, in your opinion, in using the incline and slide in combination?* A. No, sir."

Mr. SPECKLER testified (Rec., p. 80): —

"59 Int. What is the office of the slide? A. The action of the slide according to my opinion is to protect a certain portion of the membrane from falling into the instrument, and just expose a certain portion they want to operate on.

60 Int. Would it perform that function any differently in the absence of the incline?* A. It would perform the same function certainly.*

61 Int. Do you mean it would perform the same function if the incline were not there?* A. Certainly it would.* "

Dr. MICHEL said (Rec., p. 93): —

"22 Int. I ask you, as an expert in the use of such instruments, whether in your opinion the slide produces any different result when used in connection with the incline, than when used by itself? A. I can answer that in this way; with the old speculum that I said was used in 1857, we could see the same parts that we do to-day with the incline and slide, or the two combined.

23 Int. Then, as I understand it, it does not perform any different function when used with the incline? A. We used this instrument to make a diagnosis, and the same diagnosis could be made formerly with the simple speculum used in 1857, as we did with the combined instrument.

24 Int. How about the incline? Does it or not perform any different function when used with the slide? A. The same part is viewed with the incline, or without it, or with the slide, or without it, as was viewed with the old speculum. I will explain that surgeons could formerly diagnose the same diseases as they can with the combined instrument which we have here to-day."

Expert witness, KNIGHT, testified as follows on this subject (Rec., p. 120): —

"29 Int. State whether in your opinion as an expert, the incline on the end of the Brinkerhoff speculum performs the function attributed to it in the patent any differently when used in connection with the slide, than when used by itself? A. No, sir; the slide and incline in the described operation are not used simultaneously, and the function of one has no bearing on that of the other."

The complainant has not offered one word of testimony to controvert these statements, and presumably he was unable to do so. Every physician examined by the defendants testified unreservedly that there is no co-operation between the parts, and no doubt many others would have said the same.

This brings us to the fourth defense — that there is no novelty in combining the elements of the slide and incline.

Dr. Bryson thinks there is no novelty or utility whatever in the slide, and his reasons appear to be well founded. He says (Rec., p. 43): —

"A. Well, the slide does not, in my experience, facilitate the introduction of the instrument at all. If the slide is of metal you don't see anything through it. If it is of glass the tissues are pressed so tightly that the blood is pressed out and they show very little evidence of congestive disorders. The pressure of the tissues squeezes out the blood.

22 Int. How does the tube without the slide operate differently from this? A. They fall somewhat into the opening in the tube, and there being no pressure, if there are any special points of congestion you are able to discover them better. Then besides that you can see rough spots, erasions where the mucous membrane is stripped off easily. I have used such an instrument in searching for fissures of the anus, and they are sometimes, small and you must have them exposed well before you can make them out in many cases. Quite a number of cases.

23 Int. The use, then, of an instrument without a slide or opening which allows these parts to enter the tube does not disturb them? A. Yes, sir; I might say in this connection that I ordinarily prefer a Simm's vaginal speculum."

On the general question of novelty of the claims, in view of the anticipatory devices, we respectfully refer the court to the testimony of expert witness Knight, commencing on page 115 of the record.

It is unnecessary for us to more than suggest to this court the

doctrine laid down in Hailes *v.* Van Wormer to the effect that the simple fact that an instrument or apparatus contains more good points than any which preceded, does not in itself prove invention.

In conclusion, we have to ask that the decree of the lower court be affirmed, for the reasons:—

1. That the defendant has not infringed complainant's patent.

2. That the complainant was not the first to make a speculum having a slide extending the full length of the tube, and he was not the first to combine with the same an incline on the inner end of the tube.

3. That the combining of the incline and slide is a mere aggregation; and,

4. That there is no novelty in the complainant making an instrument such as is shown, described and claimed in the patent.

Respectfully submitted,

GEORGE H. KNIGHT,

Solicitor for Appellee.

St. Louis, Mo., November, 1892.